No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AEROFLOT-RUSSIAN AIRLINES,

Petitioner,

—v.—

MGM PRODUCTIONS GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a U.S. court should defer to a foreign arbitral panel in determining whether the panel's award is contrary to U.S. public policy within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

2. Whether an arbitral award ordering payment under a contract that violates U.S. sanctions laws restricting trade with Iran is contrary to U.S. public policy within the meaning of the New York Convention.

PARTIES AND CORPORATE DISCLOSURE

All parties to the proceedings in the courts below are named in the caption of the case.

Petitioner Joint Stock Company Aeroflot-Russian Airlines has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner is majority owned by the Government of Russia. The inclusion of this disclosure statement is not and should not be construed as an admission that petitioner is a nongovernmental corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aeroflot-Russian Airlines ("Aeroflot") respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on February 9, 2004.

OPINIONS BELOW

The opinion of the District Court is unreported, and is available at 2003 U.S. Dist. LEXIS 8174 and at 2003 WL 21108367. The opinion of the Court of Appeals is reported at 91 Fed. Appx. 716. The other orders in the case are unreported.

JURISDICTION

The Court of Appeals entered judgment on February 9, 2004. Aeroflot filed a timely petition for rehearing on February 23, 2004. The Court of Appeals denied rehearing on April 28, 2004. This petition has been filed within 90 days of that ruling. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATIES, STATUTES AND REGULATIONS

This case involves Article V(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (the "New York Convention"), which provides in pertinent part as follows:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ... (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

This case also involves the U.S. Treasury Department's Iranian Transactions Regulations, 31 C.F.R. §§ 560.101-560.901, and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, relevant excerpts from which are reproduced in the appendix at 18a-19a.

STATEMENT OF THE CASE

A. The Contract Between Aeroflot and Russo

In 1992, Aeroflot-Soviet Airlines, the predecessor in interest of petitioner Aeroflot-Russian Airlines (together with its predecessors, "Aeroflot"), entered into a Consultation Agreement with Russo International Management, Inc., the predecessor in interest of respondent MGM Productions Group, Inc. (together with its predecessors, "Russo"), relating to the leasing of aircraft to Iran. 21a-26a. Under the Consultation Agreement, Russo agreed to "be Consultant to [Aeroflot] in connection with any Contract relating to Iran Air or aircraft (but excluding helicopters) in Iran." 24a. According to Russo's testimony and the findings of the arbitrators in this matter, Russo—a New York corporation[1]—performed extensive consultation services with respect to the operation of Russian aircraft in Iran through 1996, including negotiating and drafting leases between Aeroflot and Iranian airlines, arranging for aircraft maintenance in Iran, and the like. 27a, 31a-34a.

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[1] Russo International Management, Inc., and its immediate successor Russo International Venture, Inc., were New York corporations. MGM Productions Group, Inc., is a California corporation formed by Russo's principal after the arbitral award was entered, and is the assignee of Russo International Venture, Inc.'s interest in the award.

B. The Iranian Transactions Regulations

In 1987, 1995 and 1997, pursuant to statutory authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, Presidents Reagan and Clinton issued four executive orders imposing sanctions against Iran. At the President's direction, the Office of Foreign Assets Control of the Department of the Treasury ("OFAC") has adopted the Iranian Transactions Regulations ("ITRs"), 31 C.F.R. §§ 560.101-560.901, to implement these Executive Orders. Under the Executive Orders and the ITRs, "United States persons" such as Russo are prohibited from engaging in a wide range of transactions in goods or services that directly or indirectly involve the Government of Iran or the territory of Iran. Among other things, the ITRs prohibit any "United States person," such as Russo, from engaging in any transaction "related to" services of Iranian origin.[2]

The broad prohibitions contained in the ITRs manifest the President's assessment of the nation's interest in sanctioning

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[2] The ITRs as adopted in 1995 barred any "United States person" from, among other things, engaging in "any transaction ... *relating to* ... services of Iranian origin," which were defined to include "[s]ervices performed in Iran or by the Government of Iran." 31 C.F.R. §§ 560.206, 560.306(a)(3) (1996 ed.) (emphasis added). Effective 1997, the regulations were amended to clarify, among other things, that U.S. persons could not engage in "any transaction or dealing in or *related to* ... services of Iranian origin ... or ... [g]oods, technology, or services for ... sale or supply, *directly or indirectly*, to Iran or the Government of Iran," including but not limited to "brokering," "financing," or "facilitating" any such services, sale or supply. 31 C.F.R. § 560.206(a)(1)-(2), (b) (emphasis added); *see also id.* § 560.208 (prohibiting any U.S. person from "facilitat[ing] ... any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States").

Iran for its "support for international terrorism, efforts to undermine the Middle East peace process, and ... acquisition of weapons of mass destruction." Message to Congress on Iran, 31 Weekly Comp. Pres. Doc. 1584 (Sept. 25, 1995). Persons who violate the ITRs are subject to civil and criminal penalties. *See* 50 U.S.C. § 1705. By their express terms, the ITRs apply to pre-existing contracts such as the parties' Consultation Agreement, as well as new contracts. *See* 31 C.F.R. § 560.515.

C. The Arbitration

In 1998, Russo commenced an arbitration against Aeroflot in Stockholm, Sweden, claiming that Aeroflot had failed to make payments owed under the Consultation Agreement and breached the requirement that Aeroflot use Russo as its exclusive consultant with respect to leases of aircraft to Iran. Aeroflot's defenses included, among others, (1) that the contract had been terminated in 1995, and (2) that the contract was unenforceable because it violated the ITRs. In their final award, the arbitrators rejected Aeroflot's defenses and found that the Consultation Agreement remained in effect through November 29, 2002, the date of the award. 33a-36a. The arbitrators found that Aeroflot was responsible for paying fees to Russo through 2002, even though Russo had performed no actual services since 1996, because Russo remained "ready, willing and able" to perform. 32a-34a. The arbitral award calls for Aeroflot to pay $13,155,000 plus costs and interest. 36a-38a.

D. The Proceedings in the Courts Below

Russo assigned its interest in the arbitral award to respondent MGM Productions Group, Inc., which filed a petition to confirm the award in the United States District Court for the Southern District of New York. The District Court issued a decision and order on May 14, 2003 granting

the petition and confirming the award. 4a. In its decision, the District Court held, in a single sentence, that the arbitral award and the Consultation Agreement on which it was based did not violate the ITRs, stating:

> The Court agrees with the arbitral panel that the Agreement does not violate the Executive Orders and OFAC Regulations. (*See* Award at 41-43 (concluding that the Agreement "can not be regarded as null and void" based on "the US Regulations on Iranian Transactions" and that "Russo's consulting responsibilities ran only to Aeroflot and not to any entity in Iran.").)

11a. The District Court also stated: "Assuming arguendo that the Agreement did violate the Executive Orders and OFAC Regulations, ... a violation of United States foreign policy does not contravene public policy as contemplated in Article V of the [New York] Convention." *Id.*

Aeroflot timely appealed. On February 9, 2004, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. Unlike the District Court, however, the Court of Appeals did not decide whether the ITRs were violated. As to the 1995 ITRs, the Court of Appeals deferred to the foreign arbitral panel:

> The arbitrators considered Aeroflot's argument that the Agreement violated the ITRs promulgated in 1995, and found that since the Agreement provided only for transactions between Russo and Aeroflot, it did not contravene the regulations. We accord great deference to the arbitrator's factual findings and contractual construction. *See Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316 (2d Cir. 1998) ("[A]n arbitration award cannot be avoided

> solely on the ground that the arbitrator may have made an error of law or fact.").

2a-3a. In the alternative, the Court of Appeals held that "the Agreement cannot be said to violate fundamental public policy" because "it would be, at most, doubtful that the Agreement violated the 1995 ITRs." 3a.

The Court of Appeals also did not reach the question of whether the Consultation Agreement violated the ITRs as amended in 1997. In that regard, the Court of Appeals rejected Aeroflot's public policy defense on the ground that "Aeroflot breached the Agreement before the 1997 ITRs went into effect," and that "[w]e cannot know, therefore, whether the parties would subsequently have amended their Agreement to avoid potential violations of the regulations, were it not for Aeroflot's breach." 3a.

Aeroflot filed a timely petition for rehearing, which the Court of Appeals denied on April 28, 2004. 17a.

REASONS FOR GRANTING THE WRIT

THE DEFERENCE, IF ANY, THAT A U.S. COURT OWES TO FOREIGN ARBITRATORS IN DETERMINING WHETHER THEIR AWARD VIOLATES U.S. PUBLIC POLICY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents the issue of whether the parties to an illegal contract can insulate the contract's illegality from full judicial scrutiny by including a provision for international arbitration. Under the reasoning of this Court's precedents, the answer to this question should be "no," but the Second Circuit and state and district courts following Second Circuit precedent have persistently reached the wrong conclusion.

A long line of this Court's decisions establishes that a contract that violates a mandatory rule of law is unenforceable. *See, e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 33-34 (1948); *McMullen v. Hoffman*, 174 U.S. 639, 654-55 (1899). And under the Second Circuit's own precedent applying this rule, a contract that violates U.S. sanctions against Iran is unenforceable. *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 243 (2d Cir. 1991). Moreover, this Court has repeatedly held that if a contract as interpreted by the arbitrators violates positive law, the award is unenforceable. *See, e.g.*, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42-43 (1987); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). It follows that an arbitration award on a contract that violates the ITRs is unenforceable.

The Second Circuit, however, has adopted a starkly different rule when the public policy issue arises in the context of a *foreign* arbitration award. Second Circuit precedent establishes that an arbitral award—even under a contract that violates mandatory provisions of positive U.S. law—is enforceable in the U.S. unless the award would "violate the forum state's most basic notions of morality and justice,'" *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974), viewed in the light of whether there is "a barely colorable justification for the outcome reached" by the arbitrators, *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003).[3] The Second Circuit's

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[3] *See also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998) (following the *Parsons* standard); *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 554-56, 13 Cal. Rptr. 3d 174, 191-92 (2d Dist. 2004) (distinguishing the district court's

(footnote continued)

deferential approach is contrary to the reasoning of this Court's decisions, ignores the text of the New York Convention, deviates from the practice of other nations that have ratified the New York Convention, and misunderstands the origin and application of the "basic notions of morality and justice" standard.

A. This Court's Cases Make Clear That Private Arbitrators Owe No Duty to Safeguard the Public Interest.

As this Court has repeatedly recognized, arbitrators are owed no deference in determining whether their own award violates public policy. Arbitration is a creature of contract, and arbitrators are private individuals chosen pursuant to contract; they are not judges or other representatives of the state chosen to safeguard the public's interest. Thus, this Court has recognized that when an arbitral award is presented for enforcement, "the public's interests ... will go unrepresented unless the *judiciary* takes account of those interests...." *Misco*, 484 U.S. at 43 (emphasis added). For this reason, "the question of public policy is ultimately one for resolution by the courts," not the arbitrators. *Grace*, 461 U.S. at 766.[4]

(footnote continued)
opinion in this case; recognizing that the courts below fashioned a rule applicable only to arbitration under the New York Convention).

[4] The present dispute in this case relates to a pure issue of law, not the facts of the transaction or the interpretation of the contract. The contract explicitly called for Russo to provide consulting services to Aeroflot related to the leasing of Russian aircraft to Iran, and only to Iran. 21a, 23a-25a. The arbitrators explicitly found that (1) Russo had been closely involved in Aeroflot's leasing of aircraft to Iran through 1996, and (2) Russo was entitled to compensation under the contract for consulting

(footnote continued)

This Court has also recognized that the enforcing court has a meaningful role to play in reviewing whether an award comports with public policy in the international context. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (enforcing international arbitration agreement because U.S. courts "will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the ... laws has been addressed"). Indeed, it is even clearer in the international context than in the domestic context that "an arbitrator is not the guardian of the public policy of any country at all," because an international award could be enforced in a wide variety of countries having differing laws. Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 Arb. Int'l 274 (1986).

The court below, however, followed its prior precedent holding that *foreign* arbitrators are entitled to greater deference in interpreting United States public policy than are *domestic* arbitrators. 2a-3a (citing *Europcar*, 156 F.3d at 316, and *Parsons*, 508 F.2d at 974); *see also Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 554-56, 13 Cal. Rptr. 3d 174, 191-92 (2d Dist. 2004) (distinguishing result below on basis that it applies only to arbitration under New York Convention). The Second Circuit first articulated

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(footnote continued)
services in connection with leasing to Iran that Russo was "ready, willing and able" to perform from 1996 to 2002, though Aeroflot had ceased allowing Russo to perform those services. 27a, 32a-34a. The disputed issues in the courts below were pure questions of law: whether the services for which the arbitrators awarded Russo compensation under the contract were illegal as a matter of U.S. federal law, and whether as a result the award is unenforceable as a matter of law under the New York Convention.

this theory in the *Parsons* case, holding that "[e]nforcement of *foreign* arbitral awards may be denied on this basis [the public-policy defense under the New York Convention] only where enforcement would violate the forum state's most basic notions of morality and justice." *Parsons*, 508 F.2d at 974 (emphasis added).

Applying this rule, the Second Circuit in the present case decided that it need not resolve the issue of whether the contract was illegal or violated public policy. 2a-3a. Rather, the court below concluded that it could uphold the award as long as it was "doubtful" whether a public-policy violation existed. 3a. The Second Circuit's rule of deference to arbitrators on the public-policy issue in the international context is directly opposed to this Court's holdings in the domestic context, which mandate that if a contract, as interpreted by an arbitral panel, "violates some explicit public policy, [courts] are *obliged* to refrain from enforcing it." *Grace*, 461 U.S. at 766 (emphasis added). Had the Second Circuit independently examined the issue as it was obliged to do, it would have recognized that the Consultation Agreement violated the ITRs, both as adopted in 1995[5] and as amended in 1997.[6]

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[5] The 1995 regulations prohibited not only imports from and exports to Iran, *see* 31 C.F.R. §§ 560.201, 560.204 (1996 ed.), but also "any transaction ... by a United States person *relating* to goods or services of Iranian origin," *id.* § 560.206. Consultation services in connection with the leasing of aircraft to Iran for *commercial airline services in Iran* plainly "relat[e] to" services of Iranian origin, *id.*, which are defined to include "[s]ervices performed in Iran," *id.* § 560.306(a)(3).

[6] The 1997 executive order and implementing regulations were intended to "consolidat[e] and clarif[y]" the existing prohibitions. Continuation of the National Emergency with Respect to Iran, 69 Fed. Reg. 12,051, 12,051 (Mar. 10, 2004). Among other things, the 1997 amendments clarified that prohibited "transaction[s] or dealing[s]" in-

(footnote continued)

The Second Circuit's deferential approach fails to appreciate that the public-policy defense is no different in the arbitration context than in any other context. As this Court has remarked, the public-policy defense to enforcement of an arbitration award is "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act." *Misco*, 484 U.S. at 42 (citations omitted). Thus, in applying the public-policy defense to enforcement of an arbitral award, a court "must treat the arbitrator's award as if it represented an agreement between [the parties] as to the proper meaning of the contract's words," and "decide whether [the] contractual ... requirement would fall within the legal exception that makes unenforceable a[n] ... agreement that is contrary to public policy." *Eastern Assoc. Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62 (2000) (internal quotation marks omitted).

This Court has made clear that "arbitration agreements [are] as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added). This Court has also recognized that in the international context, no less than the

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(footnote continued)
clude "facilitating" transactions by third-country nationals with Iran. *See* 31 C.F.R. § 560.206(b); *see also id.* § 560.208. The court below did not question that the Consultation Agreement violated this provision, but speculated that the parties could have amended the Consultation Agreement to eliminate this illegality. *See* 3a. That would, however, have required replacing the contract, the sole purpose of which was to facilitate the supply of aircraft to Iran, *see* 21a, 24a, with a completely different contract.

domestic context, an agreement to arbitrate is a contract and stands "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). The decision below disregards this fundamental principle, by conferring on a foreign panel of private arbitrators the power to validate a contract that the parties themselves were powerless to validate.

B. The Decision Below Is Contrary to the Language of the New York Convention and the Practice of the Other Contracting States.

By the text of the New York Convention, public policy is a *defense to enforcement* of an arbitral award. The Convention by its explicit terms provides that enforcement may be refused "if the competent authority in the country where recognition and enforcement is sought [here, the U.S. court] finds that ... [t]he recognition and enforcement of the award would be contrary to the public policy of that country [here, the U.S.]." New York Convention, Art. V(2)(b). Thus, the New York Convention makes clear that (1) the public-policy issue is to be determined by reference to domestic law in the country where enforcement is sought, and (2) the enforcing court is the appropriate body to determine the public-policy issue. By deferring to the arbitrators on the issue of whether their own award violates public policy, the court below ignored the Convention's command that the enforcing court should independently decide whether its own country's public policy was violated.

The Second Circuit's conclusion that a foreign panel of private arbitrators can validate an otherwise illegal contract ignores the very reason that the public policy defense was included in the New York Convention. The public policy defense in the Convention embodies the internationally recognized principle that a nation cannot allow its own courts to

enforce a contract that violates its own public policy. The courts of other signatories to the New York Convention have held that if the underlying contract as interpreted by the arbitrators violates public policy, then an award founded on the contract is unenforceable.[7] The Second Circuit and lower courts in this country following its precedents, however, have taken a contrary position.[8]

C. The Decision Below Confuses Laws Designed to Protect the Parties with Laws Designed to Protect the Interests of the State.

The court below stated that a violation of the ITRs in the circumstances of this case would not violate "fundamental public policy," citing to its decision in *Parsons*, which equates "public policy" with the "most basic notions of morality and justice." *Parsons*, 508 F.2d at 973-74. The *Parsons* decision, however, inappropriately adopts a standard that was

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[7] *See, e.g., Soleimany v. Soleimany*, [1999] Q.B. 785 (C.A. 1998) (Eng.) (holding that arbitral award was unenforceable under New York Convention where underlying contract was illegal); *Judgment of May 11, 1983*, 1983 Österreichische Juristenzeitung 519 (Oberster Gerichtshof [Supreme Court]) (Austria), *excerpted in* 10 Y.B. Commercial Arb. 421 (same); *Harris Adacom Corp. v. Perkom Sdn Bhd.* [1994] 3 Malayan L.J. 506 (Kuala Lumpur High Court Dec. 10, 1993) (Malaysia), *excerpted in* 22 Y.B. Commercial Arb. 753 (same).

[8] *See, e.g., Parsons*, 508 F.2d at 974 (constricting scope of public-policy defense in context of international arbitration); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819-20 (D. Del. 1990) (following *Parsons*); *Antco Shipping Co. v. Sidermar S.p.A.*, 417 F. Supp. 207, 216-17 (S.D.N.Y. 1976) (holding, under *Parsons*, that arbitral award was enforceable under New York Convention even if underlying contract violated U.S. anti-boycott regulations); *Kashani*, 118 Cal. App. 4th at 554-56, 13 Cal. Rptr. 3d at 191-92 (distinguishing result below as being specific to arbitration under New York Convention).

developed in the context of principles designed to do justice between the parties,[9] and transplants it into the context of laws designed to protect the interests of the state. On its facts, *Parsons* was correctly decided because the contract in that case did not violate positive law, *see Parsons*, 508 F.2d at 974 n.5; but the "morality and justice" language misapplied in *Parsons* has taken on a life of its own, distorting the lower courts' understanding of the New York Convention's public policy defense, and leading to an erroneous result in this and other cases. *See, e.g.*, 2a-3a, 11a-12a, and cases cited *supra* note 8.

Internationally, it is well recognized that the public policy defense comes into play in two distinct circumstances: (1) where the arbitral award violates fundamental principles of "justice or morality" between the parties, and (2) where the arbitral award or the underlying contract violates laws "designed to serve the essential political, social or economic interests of the State." International Law Association ("ILA") Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, in ILA, *Report of the Seventieth Conference Held in New Delhi* 6 (2002). The latter category includes "measures of embargo, blockade or boycott." *Id.* at 7. This widely recognized distinction between "fundamental" rules of justice as between the parties, and "*lois de police*" designed to protect the interests of the state, is basic to the understanding of the public policy defense under the New York Convention. *See id.* at 6; ILA Committee on

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[9] *See Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 201-02 (1918) (relied on by *Parsons*; holding that New York public policy did not forbid applying Massachusetts wrongful death statute to tort occurring in Massachusetts).

International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, in ILA, *Report of the Sixty-Ninth Conference Held in London* 17-21 (2000).

These two very different situations call for two very different standards. Where alleged unfairness between the parties is involved, courts have rightly insisted that the most fundamental principles of morality and justice truly be involved before enforcement will be refused. *See, e.g.*, *Europcar*, 156 F.3d at 315-16. Otherwise, the public-policy defense to enforcement of an arbitral award could become a vehicle for relitigation of the merits of contractual issues or for imposing United States law on foreign transactions. Moreover, where the only interests at stake are those of the parties to the arbitration, courts are rightly hesitant in entertaining a party's complaints about the unfairness of the forum it chose by contract.

But where the case implicates laws designed for the protection of the interests of the nation—such as the sanctions in place against Iran—the same concerns do not apply. Here, the President and the Secretary of the Treasury, exercising their authority pursuant to statute, have determined that the United States' public interest in combating terrorism and the proliferation of weapons of mass destruction warrants an *explicitly extraterritorial* ban on U.S. citizens' involvement with transactions with Iran. *See* 31 C.F.R. § 560.206 (applying prohibition to United States persons wherever located); *id.* § 560.314 (defining "United States person" to include any U.S. citizen, U.S. company, or person located in the U.S.). Given that the political branches have already spoken on this point, applying the public-policy defense in this case raises no concerns about unwarranted judicial extension of U.S. law to foreign transactions. Moreover, the ITRs were designed to

protect the interests of the United States and the public at large, who did not consent to have their interests determined by a privately selected foreign panel of arbitrators.

Furthermore, it is inappropriate for the courts to evaluate the importance of the public-policy goals that the ITRs were intended to serve. Here, performance of the contract would violate specific and serious legal prohibitions enacted by the legislative and executive branches, which, according to the President, "advance important objectives in furthering the nonproliferation and anti-terrorism policies of the United States." Periodic Report on the National Emergency with Respect to Iran, H.R. Doc. No. 108-47, at 4 (Mar. 13, 2003). A standard that requires the courts to second-guess the "morality and justice" of prohibitions enacted by Congress and the President undermines the ability of the political branches to speak with one voice in the sensitive area of foreign relations.

* * *

It is well established that a contract that violates positive law designed for the protection of the public interest is unenforceable as contrary to public policy. *See, e.g.*, *Eastern Assoc. Coal*, 531 U.S. at 61-62; *National Petrochemical*, 930 F.2d at 243. The court below failed to recognize that the New York Convention incorporates that principle in its public policy defense. *See* New York Convention, art. V(2)(b).

This Court should grant certiorari to address this important issue of law, and to bring the lower courts' New York Convention jurisprudence into line with this Court's domestic arbitration jurisprudence and the practice of this country's treaty partners.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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July 27, 2004

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

PRESENT: HON. AMALYA L. KEARSE,
HON. GUIDO CALABRESI,
HON. ROBERT A. KATZMANN,
Circuit Judges.

No. 03-7561
[Filed and Entered February 9, 2004]

MGM PRODUCTIONS GROUP, INC.,

Petitioner-Appellee,

v.

AEROFLOT RUSSIAN AIRLINES,

Respondent-Appellant.

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* * *

Appeal from the United States District Court for the Southern District of New York (Berman, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Petitioner-Appellee MGM Productions Group, Inc. ("MGM"), a California corporation, is the assignee of a No-

vember 29, 2002 award ("Award") of over $13 million plus interest and costs, obtained by Russo International Venture ("Russo"), a New York corporation, against Aeroflot Russian Airlines ("Aeroflot"), in an arbitration held in Stockholm, Sweden, pursuant to a 1992 agreement ("Agreement") between Russo and Aeroflot. The Award compensated Russo for Aeroflot's breach of the Agreement, under which Russo provided consulting services to Aeroflot in connection with the Russian airline's leasing of airplanes and other equipment to Iran Air.

MGM filed suit in federal district court, seeking confirmation of the arbitral award, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, open for signature, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention").

Aeroflot opposed confirmation, arguing that the Award fell under the "public policy exception" in Article V(2)(b) of the New York Convention, because it compensated Russo for Aeroflot's non-performance of an Agreement whose provisions allegedly violated the Iranian Transactions Regulations ("ITRs"), 31 C.F.R. § 560.101 *et seq.*, adopted by the Office of Foreign Assets Control of the Department of the Treasury pursuant to Executive Orders issued by the President of the United States under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706. The district court confirmed the Award, and we affirm.

The arbitrators considered Aeroflot's argument that the Agreement violated the ITRs promulgated in 1995, and found that since the Agreement provided only for transactions between Russo and Aeroflot, it did not contravene the regulations. We accord great deference to the arbitrator's factual findings and contractual construction. *See Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316 (2d

Cir. 1998) ("[A]n arbitration award cannot be avoided solely on the ground that the arbitrator may have made an error of law or fact."). Even if, in these circumstances, we did not, it would be, at most, doubtful that the Agreement violated the 1995 ITRs. And, as such, the Agreement cannot be said to violate fundamental public policy. *See Parsons & Whittemore Overseas Co. v. Societé Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973-74 (2d Cir. 1974).

Aeroflot also argues that performance of the Agreement after August 20, 1997, the date that amended ITRs went into effect, would have been illegal, and that MGM should not be compensated for breach of the Agreement when its performance by MGM's predecessor in interest would have violated U.S. public policy. We need not reach this question, however, since Aeroflot breached the Agreement before the 1997 ITRs went into effect. We cannot know, therefore, whether the parties would subsequently have amended their Agreement to avoid potential violations of the regulations, were it not for Aeroflot's breach. Under these circumstances, Aeroflot cannot now sustain an argument that enforcement of the Agreement would violate U.S. public policy.

We have considered all of the Appellant's arguments, and found them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

For the Court,

ROSEANN B. MACKECHNIE,
Clerk of Court

By: s/ Lucille Carr

[Court's notice regarding citation of unpublished opinions and identification of counsel omitted in printing.]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

03 Civ. 0500 (RMB)
[Filed May 14, 2003, Entered May 16, 2004]

MGM PRODUCTIONS GROUP, INC.,

Petitioner,

— against —

AEROFLOT RUSSIAN AIRLINES,

Respondent.

DECISION AND ORDER

I. Introduction

Petitioner MGM Productions Group, Inc. ("MGM") is the assignee of a November 29, 2002 arbitral award obtained by Russo International Ventures, Inc. ("Russo"), a New York corporation, against Aeroflot Russian Airlines ("Aeroflot"), a Russian joint stock company, in an arbitration held in Sweden at the Arbitration Institute of the Stockholm Chamber of Commerce ("Award").[1] MGM asks this Court to confirm the Award, in the amount of $13,155,000.00 plus interest and costs, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 ("Convention"), which was ratified by the United States in 1970 and codified at 9 U.S.C. §§ 201-08.

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[1] All references to "Russo" are to Russo International Venture, Inc. and Russo International Management, Inc. All references to "Aeroflot" are to Aeroflot Russian Airlines and its predecessors.

Aeroflot opposes confirmation and argues the Award is a violation of public policy because "enforcement of the award in the United States would reward [Petitioner] for violations of U.S. law." Aeroflot moves for a stay of the proceeding pending the outcome of an appeal of the Award in Sweden. **For the reasons set forth below, the Court grants Petitioner's motion to confirm the Award. The Court denies Respondent's motion to stay the proceeding.**

II. Background

In June 1992, Russo contracted with Aeroflot to provide consulting services "for the leasing of any commercial aircraft, (excluding helicopters), commercial aircraft parts, along with related service, support and spare parts contracts to Iran Air" in exchange for commissions ("Agreement"). (Agreement Preamble.) The Agreement provided for arbitration of disputes arising under the Agreement in Stockholm, Sweden under the laws of New York State and Russia. (Agreement ¶¶ 14-15.)

Between January 22, 1993 and August 19, 1996, Russo provided consulting services under the Agreement and Aeroflot made payments totaling $1,822,207.42. (Award at 39, 49.) On October 27, 1998, after a disagreement arose concerning Russo's right to certain commissions, Russo initiated an arbitration. (*See id.*) "Russo alleged that Aeroflot had breached the Consultation Agreement by withholding commissions due to Russo." (*Id.*) In response, Aeroflot argued, among other things, that it need not pay any commissions because U.S. executive orders relating to transactions with Iran and U.S. regulations implementing those orders nullified the Agreement. (*See id.* at 40 ("[T]he Consultation Agreement is null and void since it has been executed in violation of the U.S. embargo on Iranian Transactions....").) For example, Aeroflot argued that U.S. Executive Orders 12,613

("Prohibiting Imports from Iran"), 12,957 ("Prohibiting Certain Transactions With Respect to the Development of Iranian Petroleum Resources"), and 12,959 ("Prohibiting Certain Transactions With Respect to Iran"), and several regulations promulgated by the Office of Foreign Assets Control of the United States Department of the Treasury implementing those Executive Orders, 31 C.F.R. §§ 560.206 ("Prohibited trade-related transactions with Iran; goods, technology, or services"), 560.410 ("Exportation, reexportation, sale or supply of services"), and 560.515 ("30-day delayed effective date for pre-May 7, 1995 trade contracts involving Iran") (collectively "Executive Orders and OFAC Regulations"), prohibit the provision of services by Russo contemplated in the Agreement. (Award at 41.)

On November 29, 2002, the arbitration panel issued a thorough eighty-one page written Award which upheld the Agreement and directed Aeroflot to pay Russo $13,155,000.00 plus interest and costs for Aeroflot's breach of the Agreement. (Award at 80.) "Russo has ... in fact provided services under the Consultation Agreement to such an extent that its duties were fulfilled." (Award at 49.) "[T]he tribunal finds that Aeroflot shall reasonably be awarded ... compensation for unpaid commissions." (Award at 70.) "[T]he transactions in which Russo was engaged can not be regarded as related to goods or services originated in Iran or owned or controlled by the Iranian Government" and, consequently, did not violate the Executive Orders and OFAC Regulations. (Award at 42-43.)

Russo transferred its interest in the Award to MGM, effective January 9, 2003 (Saroudi Decl. Ex. A).[2] MGM filed

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[2] Aeroflot argues that MGM does not have standing to bring this proceeding because Craig Saroudi (the sole owner of Russo and MGM), not

(footnote continued)

this action on January 23, 2003.[3] MGM claims that all necessary grounds exist for this Court to confirm the Award. (Pet'r Br. at 4 ("An arbitral award is sufficiently final for confirmation purposes provided that no further recourse may be had to the appeals division of the arbitral tribunal.... [T]he mere fact that recourse may somehow be had in another court of law does not prevent the Award from being 'binding.'" (citations omitted)).) Aeroflot contends that United States public policy, namely the United States's prohibition against certain transactions with Iran, bars confirmation of the Award. (Resp. Br. at 5-6 ("Because the arbitrators' award seeks to compensate Russo for acts that violate laws forbidding Americans from engaging in transactions relating to Iran, and to impose liability on Aeroflot for not enabling Russo to engage in further illegal acts, the award is contrary to U.S. public policy.") Aeroflot cites the same Executive Orders and OFAC Regulations cited by the Swedish arbitral panel, as

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(footnote continued)
Russo, assigned Russo's award to MGM on January 9, 2003. (*See* Decl. of Fred. G. Bennett Ex. H.) In response, MGM submitted a new "Assignment of Assets," dated March 21, 2003. The "Assignment of Assets" states that the assignment is "effective as of January 9, 2003," and that Russo assigned to MGM: "One hundred percent of the interest of Russo International Ventures, Inc. in the Award, dated November 29, 2002, in the case of Russo International Ventures, Inc. v. Aeroflot Russian Airlines, case number 091/1998." (Decl. of Craig Saroudi Ex. A.)

[3] On February 14, 2003, Aeroflot initiated an appeal in the Svea Hovrätt (Court of Appeal) in Sweden to annul the Award, claiming that "the arbitrators erred by (1) applying the conflict-of-laws standards of the jurisdictions chosen by the parties, rather than their substantive laws as required, (2) failing to consider and address Aeroflot's objection that it owes no money to Russo under applicable law because it did not accept Russo's services in writing, and (3) failing to take into account Article 782 of the Russian Civil Code of 1994." (Resp. Br. at 4.)

well as Executive Order 13,059 ("Prohibiting Certain Transactions With Respect to Iran"), 31 C.F.R. §§ 560.204 ("Prohibited exportation, reexportation, sale or supply of goods, technology, or services to Iran"), 560.208 ("Prohibited facilitation by United States persons of transactions by foreign persons"), and 560.701 ("Penalties").[4] Rather than confirm the award, Aeroflot asks the Court to stay this proceeding pending a decision in the Svea Hovrätt (Court of Appeal) in Sweden.

III. Standard of Review

"The confirmation of an arbitration award is characterized as a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Sarhank Group v. Oracle Corp.*, 01 Civ. 1285, 2002 WL 31268635, at *3 (S.D.N.Y. Oct.9, 2002). "Accordingly, 'the showing required to avoid summary confirmance is high.'" Id. at *4 (quoting *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir.1987)); *see also Pike v. Freeman*, 266 F.3d 78, 89 (2d Cir.2001) (noting the "strong federal policy favoring arbitration, the enforcement of arbitration agreements and the confirmation of arbitration awards").

In enforcement proceedings under the Convention, a court may consider only the specific defenses listed in Article V as grounds for refusing to enforce an award.[5] *Europcar*

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[4] For the remainder of this Order, references to "Executive Orders and OFAC Regulations" include the U.S. executive orders and regulations cited by the Swedish Arbitral panel as well as those Aeroflot raised in this Court.

[5] Article V of the Convention sets forth seven bases to refuse to enforce an arbitral award. In the present action, Aeroflot advances only one of these, i.e., the so-called public policy defense to enforcement. Article V section (2)(b) states in relevant part: "2. Recognition and enforcement

(footnote continued)

Italia, S.p.A. v. Maillano Tours, Inc., 156 F.3d 310, 313 (2d Cir.1998); *Henry v. Murphy*, M-82, 2002 WL 24307, at * 3 (S.D.N.Y. Jan.8, 2002) (citing *Yusef Ahmed Alghanim & Sons v. Toys 'R' Us, Inc.*, 126 F.3d 15, 20 (2d Cir.1997)); *see also* 9 U.S.C. § 207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."); *Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 309 (S.D.Tex.1997) ("[T]he court must confirm the award unless [the party opposing confirmation] alleges and proves one of the reasons for denying enforcement provided in Article V of the Convention.").

Courts construe the public policy limitation in the Convention very narrowly and apply it only where enforcement would violate the forum state's "most basic notions of morality and justice." *Europcar Italia*, 156 F.3d at 313; *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir.1984); *Trans Chem. Ltd.*, 978 F. Supp. at 310 n. 193 (citing *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir.1975)); *Geotech Lizenz AG v. Evergreen Sys., Inc.*, 697 F. Supp. 1248, 1254 (E.D.N.Y.1988). "When construing this section, the Court of Appeals for the Second Circuit has noted the 'pro-enforcement bias' of the Convention." *Geotech Lizenz*, 697 F. Supp. at 1254 (citing *Parsons & Whittemore Overseas Co. v. Societe Generale de*

(footnote continued)
of an arbitral award may … be refused if the competent authority of the country where recognition and enforcement is sought finds that: … (b) The recognition or enforcement of the award would be contrary to the public policy of that country." (Convention Art V § (2)(b).)

L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir.1974)).

IV. Analysis

The Court has reviewed, among other things, the "Notice of Motion to Confirm Arbitral Award and for Entry of Judgment" and "Petitioner's Memorandum of Law in Support of Its Motion to Confirm Arbitral Award and for Entry of Judgment," dated February 13, 2003, as well as the "Declaration of Fred G. Bennett in Support of the Motion to Confirm Arbitral Award and for Entry of Judgment," dated February 11, 2003; "Aeroflot's Memorandum of Law in Opposition to the Petition and Motion of MGM Productions Group, Inc. to Confirm the Arbitral Award and for Entry of Judgment," "Appendix of Authorities," and "Declaration of Carl Micarelli in Opposition to the Petition and to Petitioner's Motion to Confirm the Arbitral Award and for Entry of Judgment," dated March 12, 2003; Petitioner's "Reply Memorandum of Law in Support of Petition and Motion of MGM Productions Group, Inc. to Confirm Arbitral Award and for Entry of Judgment" and "Per Runeland's First Affidavit," dated March 26, 2003, as well as "Declaration of Craig Saroudi," dated March 25, 2003; Aeroflot's surreply letter, dated April 14, 2003; and Petitioner's letter in response to Aeroflot's surreply letter, dated April 17, 2003. The Court heard argument on May 13, 2003.

The Convention, which the United States ratified in 1970, applies to petitions to confirm foreign arbitral awards. (Convention Art. I ("This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.").) There is no basis not to confirm the Award.

The parties dedicate a substantial portion of their submissions to whether the Agreement violates the Executive Orders and the OFAC Regulations. For example, Aeroflot argues that "the arbitrators' award seeks to compensate Russo for acts that violate laws forbidding Americans from engaging in transactions relating to Iran, and to impose liability on Aeroflot for not enabling Russo to engage in further illegal acts." (Resp. Br. at 1, 5-6 ("'United States persons' such as Russo are forbidden by federal law to participate in or facilitate such Iranian transactions.").) MGM counters that the Executive Orders and OFAC Regulations do not apply here. (*See, e.g.*, Pet'r Br. at 3 ("Russo's services were performed on behalf of ... Aeroflot only and ... Aeroflot—not Russo—negotiated the Iran Air lease and other leases for Russian aircraft."), 15 ("By its express terms, the Agreement required Petitioner to provide consultation services *to Aeroflot.*").)

The Court agrees with the arbitral panel that the Agreement does not violate the Executive Orders and OFAC Regulations. (*See* Award at 41-43 (concluding that the Agreement "can not be regarded as null and void" based on "the U.S. Regulations on Iranian Transactions" and that "Russo's consulting responsibilities ran only to Aeroflot and not to any entity in Iran.").) Assuming arguendo that the Agreement did violate the Executive Orders and OFAC Regulations, Aeroflot has not convinced the Court that the public policy defense supports its cause.[6] The public policy defense to enforcement of an arbitral award applies only

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[6] The party asserting that one of the exceptions applies has the burden of establishing it. *See Europcar Italia, S.p.A. v. Maillano Tours, Inc.*, 156 F.3d 310, 313 (2d Cir.1998); *Henry v. Murphy*, M-82, 2002 WL 24307, at *3 (S.D.N.Y. Jan.8, 2002).

where enforcement would violate the forum state's "most basic notions of morality and justice." *Europcar Italia, S.p.A. v. Maillano Tours, Inc.*, 156 F.3d 310, 313 (2d Cir.1998). That is not the case here. The United States Court of Appeals for the Second Circuit has held that a violation of United States foreign policy does not contravene public policy as contemplated in Article V of the Convention. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrialie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir.1974) ("In equating 'national' policy with United States 'public' policy, the [party seeking to overturn confirmation] quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis."); *see Nat'l Oil Corp. v. Sun Oil Co.*, 733 F. Supp. 800, 819 (D.Del.1990) (stating that "'public policy' and 'foreign policy' are not synonymous"); *see also Belship Navigation, Inc. v. Sealift, Inc.*, 95 Civ. 2748, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) ("'Public policy' and 'national policy' are not synonymous."); *Antco Shipping Co. v. Sidermar, S.p.A.*, 417 F. Supp. 207, 215- 16 (S.D.N.Y.1976) (declining to equate national policy with public policy).

Public policy arguments, such as those presented here, should be accepted with caution, so as not to discourage enforcement of United States arbitration awards by courts of other countries. *Sarhank Group v. Oracle Corp.*, 01 Civ. 1285, 2002 WL 31268635, at *6 n. 6 (S.D.N.Y. Oct.9, 2002) ("[C]onsiderations of reciprocity expressly recognized in the

Convention counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States."); *Coutinho Caro & Co. v. Marcus Trading, Inc.*, Nos. 3:95CV2362, 3:96CV2218, 3:96CV2219, 2000 WL 435566, at *12 (D. Conn. Mar. 14, 2000) (same). Here, Aeroflot unconvincingly alleges that the Agreement violates the United States's foreign policy respecting Iran. It has not persuaded the Court that the Agreement violates our country's "most basic notions of morality and justice." *Europcar Italia,* 156 F.3d at 313; *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir.1984). Consequently, the Court confirms the Award.

Aeroflot also argues that this Court should stay this proceeding under Article VI of the Convention and await the appellate decision from the Svea Hovrätt (Court of Appeal) in Sweden. (*See* Convention Art. VI (permitting a court to "adjourn the decision on the enforcement of the award" where "an application for the setting aside or suspension of the award has been made to a competent authority").) Aeroflot contends that the Court "'may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings.'" (Resp. Br. at 23 (quoting *Europcar Italia,* 156 F.3d at 317).)

Aeroflot has not persuaded the Court that a stay is appropriate. "[A] district court should not automatically stay enforcement proceedings on the ground that parallel proceedings are pending in the originating country." *Nedagro B.V. v. Zao Konversbank,* 02 Civ. 3946, 2003 WL 151997, at *6 (S.D.N.Y. Jan.21, 2003); *see also Europcar Italia,* 156 F.3d at 313. In *Europcar Italia,* the Court of Appeals for the Second Circuit stated that "[a] stay of confirmation should not be lightly granted lest it encourage abusive tactics by the

party that lost in arbitration" and set forth a list of factors a court should consider on a motion to stay. *Id.* at 317-18.[7]

Aeroflot has not demonstrated that these factors weigh in favor of granting a stay. Quite the contrary. Confirmation, not a stay, advances the general objective of "expeditious

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[7] A court considers:

> (1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;
>
> (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;
>
> (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;
>
> (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;
>
> (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the Convention, the party seeking enforcement may receive 'suitable security' and that, under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country; and
>
> (6) any other circumstances that could tend to shift the balance in favor of or against adjournment.
>
> ...
>
> **[T]he first and second factors on the list should weigh more heavily in the district court's decision.**

Europcar Italia, 156 F.3d at 317-18 (citation omitted).

resolution of disputes." *Id.* at 317; *see also Sarhank Group v. Oracle Corp.*, 01 Civ. 1285, 2002 WL 31268635, at *3 (S.D.N.Y. Oct.9, 2002) ("The adjournment of enforcement proceedings impedes the goals of arbitration, i.e., the expeditious resolution of disputes."). Aeroflot's Swedish appeal seeks a broad review of the interpretation of the Agreement—issues the arbitration panel presumably already considered—and promises to delay the finality of the arbitration, which Russo commenced in 1998, even further. (*See* Per Runeland's First Aff. ¶ 8, at 3.) In addition, the Swedish appeal has only just begun. As Aeroflot points out, "Russo and MGM have yet to file responses [to Aeroflot's appellate petition]." (Resp. Br. at 4.) Aeroflot alleges—with an unexplained cite to the *Europcar Italia* opinion—that "the foreign proceedings can be expected to proceed expeditiously." (Resp. Br. at 24.)

Also, the Swedish appeal was not brought to confirm the Award. Aeroflot brought the appeal to set aside the Award, and did so only after MGM petitioned this Court to confirm. *Sarhank Group,* 2002 WL 31268635, at *3 ("The fact that the pending foreign appeal seeks to set aside, not enforce, the award weighs in favor of enforcement in spite of the parallel proceedings ongoing in the originating country.").

The Court also believes that the balance of the hardships of a stay is greater on MGM, assignee of Russo, the party that provided services without receiving payment, than upon Aeroflot, the party that received services without paying for them. *See Europcar Italia,* 156 F.3d at 318; (*see also* Decl. of Craig Saroudi ¶ 2, at 1 ("MGM ... ha[s] been deprived of millions of dollars owed under the Consultation Agreement for years. As a result ... [MGM] is hampered in its financial ability to carry on meaningful business operation.").)

At oral argument, counsel for MGM delivered to the Court a copy of the May 9, 2003 decision of the Svea Hovrätt (Court of Appeal) in Stockholm, Sweden that denied Aeroflot's request to stay enforcement of the Award in Sweden pending the outcome of the appeal. (*See* Pet'r Letter to the Court attaching May 9, 2003 decision of the Svea Hovrätt (Court of Appeal) in Sweden, dated May 13, 2003, attachment at 2 ("The Court of Appeal rejects Aeroflot's application for a stay of execution.").) On May 14, 2003, counsel for Aeroflot informed the Court that Aeroflot "has no further comments on the ... decision of the Svea Court of Appeal." (Resp. Letter to the Court, dated May 14, 2003.) The May 9, 2003 determination by the Svea Hovrätt only strengthens this Court's conclusion that a stay is unwarranted here.

V. Conclusion

For the reasons stated, the Court confirms the Award and denies Respondent's motion to stay the proceeding. The Court respectfully requests that the Clerk close this case.

Dated: New York, New York
May 14, 2003

s/ RMB
RICHARD M. BERMAN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse,
40 Foley Square, New York 10007,
Roseann B. MacKechnie, Clerk

No. 03-7561
[Filed and entered April 28, 2004]

MGM Productions

v.

Aeroflot

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Aeroflot.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: s/ Arthur Heller
Arthur M. Heller
Motions Staff Attorney

STATUTES AND REGULATIONS

IRANIAN TRANSACTIONS REGULATIONS AS ADOPTED EFFECTIVE 1995 (EXCERPTS)

* * *

31 C.F.R. § 560.206. Prohibited transactions related to Iranian-origin goods or services.

Except as otherwise authorized, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, any transaction, including purchase, sale, transportation, swap, financing, or brokering transactions, by a United States person relating to goods or services of Iranian origin or owned or controlled by the Government of Iran is prohibited.

* * *

IRANIAN TRANSACTIONS REGULATIONS AS AMENDED EFFECTIVE 1997 (EXCERPTS)

* * *

31 C.F.R. § 560.206. Prohibited trade-related transactions with Iran; goods, technology, or services.

(a) Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, no United States person, wherever located, may engage in any transaction or dealing in or related to:

(1) Goods or services of Iranian origin or owned or controlled by the Government of Iran; or

(2) Goods, technology, or services for exportation, reexportation, sale or supply, directly or indirectly, to Iran or the Government of Iran.

(b) For purposes of paragraph (a) of this section, the term *transaction or dealing* includes but is not limited to purchasing, selling, transporting, swapping, brokering, approving, financing, facilitating, or guaranteeing.

* * *

31 C.F.R. § 560.208. Prohibited facilitation by United States persons of transactions by foreign persons.

Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, no United States person, wherever located, may approve, finance, facilitate, or guarantee any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States.

* * *

INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT § 206.

50 U.S.C. § 1705. Penalties.

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates, or attempts to violate, any license, order, or regulation issued under this chapter.

(b) Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

* * *

FINAL AWARD
[Excerpts]

rendered in Stockholm on November 29, 2002

Case no: 091/1998

CLAIMANT :

Russo International Venture, Inc., 163 Third Avenue #339, New York, N.Y. 10003, U.S.A.

* * *

RESPONDENTS :

1. Aeroflot Russian International Airlines, 37 korp. 9, Leningradsky prospect, Moscow, 125167, Russian Federation

2. Center of International Accounts of Aeroflot, same address

* * *

---

* * *

FACTUAL BACKGROUND

In June 1992 the American company Russo International Management, Inc. and the International Commercial Department of Civil Aviation of Russia–"Aeroflot Soviet Airlines" signed an agreement concerning leasing of commercial aircraft called "Consultation Agreement". In an amendment to the Consultation Agreement, the parties agreed that, as from September 25, 1992, Russo International Venture Inc. was

assigned as successor to Russo International Management, Inc. It is undisputed that Aeroflot–Soviet Airlines is the predecessor-in-interest to Aeroflot Russian International Airlines.

The Consultation Agreement reads as follows:

> This Agreement, made and entered into effect on the day of June 1992, between International Commercial Department of Civil Aviation "Aeroflot–Soviet Airlines" registered in the city of Moscow, Russian Federation, hereinafter called the "Supplier" and Russo International Management, Inc., a corporation incorporated in the State of New York, USA, hereinafter called the "Consultant", for the leasing of any commercial aircraft, (excluding helicopters), commercial aircraft parts, along with related service, support and spare parts contracts to Iran Air, hereinafter called the "Purchaser". In consideration of the mutual covenants contained herein, the Supplier an the Consultant hereby agree as follows:
>
> 1(a). "Contract" shall mean execution of any contract or lease in the future between Supplier and Purchaser for any supply of commercial aircraft, commercial aircraft parts, maintenance, repair and other services agreed to between sand Parties.
>
> 1(b). The "Bank" shall mean such bank or financial institution acceptable to the Parties hereto as guarantor of payment to Consultant.

1(c). The Supplier guarantees, warrants and protects payment of the Consultant's compensation and fees and shall have the text of this Agreement endorsed by an international recognized bank, and the Supplier will establish an irrevocable, confirmed letter of credit in favor of Consultant or pay Consultant's fees by certified or bank check, or wire transfer at the times designated in Paragraph 5. The Consultant will participate in financial arrangements of the Contract in favor of the Supplier.

2. That the term of this Agreement shall commence on the date of execution of this Agreement and continue thereafter for a period of the time equal to the initial term of the Contract and any extension thereof. Supplier shall cooperate with Consultant and provide all documents reasonably requested by Consultant within fifteen (15) days of such request. No subsequent amendments or modifications to the Contract shall reduce the terms of this Agreement for the period of time during which the Consultant is entitled to receive compensation.

3. That the Supplier retain the Consultant as consultant in an advisory capacity, only for the purpose of consulting with the Consultant concerning the Contract and acquiring any other consultation or advisory service from other sources shall not interfere with the terms of this Agreement.

4. Supplier shall consult with the Consultant at times reasonably requested and such consulta-

tions shall be performed at the places and times and manners that Consultant may from time to time select and/or designate. All costs of travels and accommodation shall be paid by the party requesting same.

5. That the compensation to be paid to the Consultant by the Supplier shall be five per centum (5%) of the amount paid for each commercial aircraft, and for support spare parts, purchased or leased during the term of this Agreement and extensions thereof, simultaneously with the payment of the proceeds of the letter of credit, or any pan thereof, to the Supplier. Such payments shall be made to the Consultant on the same terms and conditions as and when payments are made to the Supplier under the terms of the Contract acquired by the Purchaser with the stipulation that payment of each Consultant's fees shall be simultaneous with the collection of the proceeds of the letter of credit, or any part thereof, by the Supplier. The Bank, by endorsing the text of this Agreement, unconditionally guarantees timely payment of the Consultant's fees as specified herein in the Agreement. The Supplier hereby agrees and the Bank hereby confirms and guarantees to make an payments to the Consultant in the same convertable had currency that Iran Air pays for the Supplier (US Dollars, Japanese Yen, UK Pounds, German Deutschemark, Swiss Francs, French Francs, Italian Lira). The Bank also confirms and guarantees that all such payments are transferrable to the account of the Consultant. The banks and accounts to receive

the Consultant's fees will designated by the Consultant not later than the time of the transfers.

6. That no Parry hereto shall be liable, responsible or accountable of any representations made in good faith by said Party.

7. That the Contract is executed and during the execution and the term thereof the Consultant shall be Consultant to the Supplier in connection with any Contract relating to Iran Air or aircraft (but excluding helicopters) in Iran.

8. That no merger, consolidation and/or other representation of the Supplier or Purchaser creating a new entity shall affect the duties and obligations of either Party pursuant to the terms and provision of this Agreement, including but not limited to the payment of compensation to the Consultant, and the guarantee of the said payment.

9. That this Agreement shall be binding upon and inure to the benefits of both the Supplier and the Consultant and their heirs, personal representatives, successors and assignees; provided, however, that this agreement may not be assigned, except as otherwise herein provided, by either Consultant or Supplier without the prior written consent of the other Party.

10. That all notices to be given pursuant to the terms and conditions of this Agreement shall be in writing and shall be served by personal service of registered mail., to the Supplier or to the Con-

sultant and the addresses set forth immediately after the signatures to this Agreement. The date of service if mailed shall be the date of receipt Either Party may designate a new address by written notice to the other.

11. That if the Contract is executed, the Supplier shall deliver to the Consultant a photocopy of such articles of the Contract required by the Consultant and approved by the Supplier within five days after the signing, i.e. execution of the Contract.

12. This commitment shall be confirming guarantee and shall remain valid and effectual and irrevocable during the entire term of the Contract for so long as it shall last irrespective of whatever changes in price or the terms and conditions thereof are made during the term of the Contract and any extensions thereof.

13. Upon the execution of this Agreement and/or after the completion of any Contract, the Supplier will not enter into any agreement with any party other than Consultant with respect to leasing commercial aircraft (but excluding helicopters) to Iran Air or for use in Iran.

14. In the event of any unresolved disputes, such agreement shall be submitted to a board of arbitration in accordance to the rules and regulations of the International Institute of Arbitration. Such arbitration shall be conducted in Stockholm, Sweden. All documentation shall be in the English language.

15. This Agreement is governed by the regulations of the International Institute of Arbitration and shall be construed by the laws of Russian Federation and the State of New York (USA).

16. The dispositive language for the interpretation, execution, enforcement, arbitration, and any documentation related to the text, of this Agreement shall be the English language, in which language this Agreement has been drawn and made. In the event any dispute or disagreement between the translations and this present English text, the English language shall prevail.

17. This Agreement consists of seventeen (17) articles and three (3) sub-articles [Article l(a), 1(b) and 1(c)]. This Agreement may be executed in counterparts, any combination of which, if bearing original signatures, shall be considered a duly executed original.

In witness whereof, the Parties hereto have executed this Agreement as of this day of June 1992 in the city of New York.

The Consultation Agreement is signed by Russo International Management, Inc. as Consultant and by International Commercial Department of Civil Aviation of Russia as Supplier. The Consultation Agreement has also been signed by Center of International Accounts of Aeroflot.

* * *

STATEMENTS BY THE PARTIES

Russo:

* * *

While in Moscow, Mr. Soroudi [the president of Russo] provided services on a daily basis for Aeroflot, as requested, including counselling regarding (1) the need to obtain certificates of airworthiness and registration for Civil Aviation of Iran; (2) how to arrange for payment of transport of planes from Russia to Iran; and (3) how to set up letters of credit to facilitate international payments.

* * *

Throughout 1993 and 1994, Russo provided consultation services as requested by Aeroflot, including, among other things, assisting with negotiations and drafting of each protocol and amendment to the Iran Air contract. In addition, Russo assisted Aeroflot with collections and banking transaction issues related to the lease with Iran Air.

* * *

In early 1995, Aeroflot began to fall behind in its payments of Russo's commissions. Russo inquired about the delay and was repeatedly assured that the payments would be forthcoming. Russo continued to provide consultation services for Aeroflot, as requested, through 1995 and 1996.

The last payment Russo received from Aeroflot was August 19, 1996. * * *

* * *

Aeroflot:

* * *

* * * [T]he Consultation Agreement falls under the provisions of the Iranian Transactions Regulations, was concluded in violation thereof, and was null and void.

* * *

Russo has failed to provide any proof that consulting services under the Consultation Agreement have ever been provided by Russo to Aeroflot and have ever been explicitly accepted by Aeroflot for the purpose of the Consultation Agreement. Aeroflot denies that such services were ever provided. * * *

* * *

REASONS FOR THE AWARD

* * *

2. Is the Consultation Agreement Null and Void because of the US Regulations on Iranian Transactions?

2.1 Provisions Referred to by Aeroflot.

In support of its assertation that the Consultation Agreement is null and void, Aeroflot has referred to (i) Executive Order 12613 issued by President Reagan, (ii) Executive Order 12957 issued by President Clinton and (iii) Executive Order 12959 which was also issued by President Clinton and by which some of the provisions of Order 12957 were revised. Executive Order 12959 was incorporated into the Iranian Transactions Regulations, 31 CFR 560. Among the sections of the said Regulations, Aeroflot has, in particular, pointed at Sections 560.206, 560.410 and 560.515.

In Section 1 of Executive Order 12613 it is stated that, except as otherwise provided in regulations issued pursuant

to this Order, no goods or services of Iranian origin may be imported into the United States after the effective date of the Order. According to Section 3, the Order took effect on October 29, 1987.

Section 560.206 of the Iranian Transaction Regulations stipulates that any transaction, including purchase, sale, transportation, swap, financing, or brokering transactions, by a United States person relating to goods and services of Iranian origin or owned or controlled by the Government of Iran is prohibited.

Section 560.410(a) prohibits the exportation of services from the United States that are performed on behalf of a person in Iran or the Government of Iran or where the benefit of such services is otherwise received in Iran, if such services are performed (1) in the United States, or (2) outside the United States by an individual United States person ordinarily resident in the United States, or (3) outside the United States by an overseas branch of an entity located in the United States. Section 560.410(b) states that the benefit of services performed anywhere in the world on behalf of the Government of Iran is presumed to be received in Iran.

Section 560.515 provides a 30 day grace period to complete performance of trade contracts entered into prior to May 7, 1995, and involving Iran. Sub-section (a)(2) states, *inter alia*, that if the pre-existing trade contract is for the exportation of services from the United States and benefitting a person in Iran or the Government of Iran, all obligations under the pre-existing trade contract must be fully completed prior to 12:01 a.m. EDT, June 6, 1995.

2.2 The Tribunal's Opinion

The Tribunal notes initially that the goods that were the subject of the Consultation Agreement were Russian aircraft

leased by Aeroflot to Iran Air (and, according to Russo, also to other Iranian airlines). Thus, the goods did not originate in Iran, nor were they imported into the United States. The same goes for such services as were covered by the Consultation Agreement.

In view of what has now been said, the Tribunal finds that the Consultation Agreement did not violate Executive Order 12613.

When it comes to Section 560.206 of the Iranian Transaction Regulations, it has a wide scope of application. Thus, it covers not only the specific types of transactions listed in the Section but "any transaction". Further, the Section does not require that the transaction is concluded between a US person and an Iranian entity. Thus, the fact that the Consultation Agreement was concluded between Russo and Aeroflot and that, under the terms of the Agreement, Russo was to serve only as consultant and not as a buyer or seller etc. does not exclude the application of Section 560.206.

On the other hand, the said Section only applies to transactions relating to "goods or services of Iranian origin or owned or controlled by the Government of Iran". It follows from the Consultation Agreement that Russo's duties ran solely to Aeroflot and dealt only with the leasing of Russian aircraft. Thus, in the Tribunal's opinion, the transactions in which Russo was engaged can not be regarded as related to goods or services originated in Iran or owned or controlled by the Iranian Government.

Accordingly, in the Tribunal's opinion, there is no conflict between the Consultation Agreement and Section 560.206.

With respect to Section 560.410 of the Iranian Transaction Regulations it is clear that, under the Consultation

Agreement, Russo did not perform services on behalf of a person in Iran or the Government of Iran. It should. further. be noted that Russo's consulting responsibilities ran only to Aeroflot and not to any entity in Iran. Accordingly, the benefits arising out of Russo's consulting activities accrued to Aeroflot. Thus, even though Aeroflot's customers—the Iranian airlines—may indirectly have benefitted from the advice given to Aeroflot by Russo, that does not, in the Tribunal's opinion, make Section 560.410 applicable.

Accordingly, the Consultation Agreement did not violate the said Section.

Since neither Section 560.206 nor Section 560.410 is applicable, there is no need to dwell on the provisions concerning a grace period in Section 560.515.

To conclude, the Tribunal finds that the Consultation Agreement can not be regarded as null and void on the ground now discussed.

3. Is Russo Not Entitled to Compensation because of Failure to Provide Consulting Services?

* * *

3.4 Evidence Invoked by Russo

* * *

Mr. Soroudi, in his affidavit, has stated, *inter alia*:

* * * While in Moscow, he provided services on a daily basis for Aeroflot, including counselling regarding (1) the need to obtain certificates of air worthiness and registration for Civil Aviation of Iran, (2) how to arrange for payment of transport of planes from Russia to Iran, and (3) how to set up letters of credit to facilitate international payments. He also assisted with negotiations and drafting of each protocol and

amendment to the Iran Air contract. * * * In 1995, Aeroflot moved its leasing operations to a daughter company called "Aeroflot Leasing Ltd". However, he understood his role to be unchanged and continued to provide services for Aeroflot. He did so through 1995 as well as 1996. — In November 1996, he attended a meeting in London with two representatives of Aeroflot to discuss the supply of additional aircraft to Iran. * * *

When heard before the Tribunal, Mr. Soroudi confirmed what was said in his written affidavit. He added, among other things: After having been asked by Aeroflot to move to Moscow, he remained there from August 1992 until the middle of 1996 and worked full time for Aeroflot. * * *

* * *

3.5 The Tribunal's Conclusions

* * *

With respect to the question whether Russo is barred from compensation under the Consultation Agreement since no consulting services were rendered, no problem seems to occur, provided that New York law is applicable. Russo has contended that, under New York law, Russo will be entitled to compensation whether consulting services were in fact rendered or not. The mere fact that Russo was prepared to provide consultation would be sufficient. This contention has not been questioned by Aeroflot.

If Russian law has to be applied, it seems clear that Russo is not barred from compensation in the case that services have been rendered and accepted. In such a case it does not seem to be of any importance whether the 1994 Civil Code or the preceding legislation is applicable. If no services have been provided by Russo, the situation is more doubtful.

After having made these statements the Tribunal will turn to the question whether Russo did fulfill its duties under the Consultation Agreement. In this context there is reason to state that, as consultant, Russo not only had to actually provide services but also to make itself available, i.e. to stand at all time ready, willing and able to perform Aeroflot's requests.

Russo's contention that services were in fact rendered is supported by the written affidavit and the oral testimony by Mr. Soroudi. He has given a detailed report on his activities after the Consultation Agreement had been signed and has mentioned several examples of the way he assisted Aeroflot. His allegation that he, upon Aeroflot's request, lived in Moscow for several years has not been contested by Aeroflot. The written evidence submitted also shows that he often went to Moscow. It must be assumed that, during his stay there, he was available and prepared to render such services as were requested by Aeroflot.

It should, further, be noted that Aeroflot has not objected to Russo's allegation that they never, before the arbitration was initiated, claimed that Russo had failed to provide services or to otherwise fulfill its duties. On the contrary, the letter dated November 10, 1994 from Aeroflot to City Bank in Moscow indicates that, during several years, Russo had been successfully cooperating.

Importance must also be attached to the fact that Aeroflot has paid substantial sums under the Consultation Agreement. As far as has been shown, the payments went on until August 1996.

The written evidence further indicates that, after that date, Aeroflot informed Russo of its intention to go on paying commission and pursue the parties' cooperation. And when Aeroflot, in February 1997, informed Russo that the validity

term of the Consultation Agreement had expired, Aeroflot never claimed that the termination was due to any breach of contract on the part of Russo.

In view of what has now been said, the Tribunal finds that Russo has not only stayed available but has also in fact provided services under the Consultation Agreement to such extent that its duties were fulfilled. Russo's services were also, as far as has been shown, accepted by Aeroflot.

Having stated this, the Tribunal does not need to go into the question whether Russian or New York law is applicable. Irrespective of which law shall apply, Russo is not barred from claiming compensation because of inactivity.

Thus, the objection on the part of Aeroflot which has now been discussed shall be rejected.

* * *

7. Has the Consultation Agreement been Terminated?

The written evidence submitted by the parties includes a letter, dated February 7, 1997, which was sent to Russo from Mr. A.S. Krasneker, Commercial Director of Aeroflot. In the letter reference is made to the May 1992 Contract. It is pointed out that this Contract terminated on June 30, 1995 and that all the commercial obligations between Aeroflot and Russo had been completely fulfilled. It is further stated that Aeroflot by the letter officially notified Russo that, in accordance with Article 2 of the Consultation Agreement, its validity term terminated on June 30, 1995, and that after the mentioned date the Agreement and the Amendment 1 to it were considered expired and not in force.

Aeroflot has alleged that, if the term of the Consultation Agreement is not deemed to have run out automatically, it was in any case terminated by the said letter.

The Tribunal notes, initially, that the letter is not formulated so as to contain an explicit and independent cancellation of the Consultation Agreement. Instead, the letter contains a reference to the May 1992 Contract and an interpretation of Article 2 of the Consultation Agreement and its consequences.

In the Tribunal's opinion, Aeroflot's interpretation is incorrect. In the previous Section, the Tribunal has concluded that, besides the May 1992 Contract, even other leasing contracts which were concluded "in the future" might be covered by the Consultation Agreement, and that, as a consequence, the term of the Consultation Agreement did not automatically ran out at the same time as the term of the May 1992 Contract.

Thus, in view of the way the letter of February 7, 1997 was formulated, the Tribunal finds that the Consultation Agreement was not terminated by the letter.

It should, further, be noted that, as far as has been shown, the contacts between the parties went on even after February 7, 1997. Thus, in 1999 a meeting was held in Montreal with the participation of Mr. Ostroumov on behalf of Aeroflot. Mr. Soroudi and Mr. Scott, in their written affidavits, have stated that, at the meeting, Mr. Ostroumov suggested that the parties engage in a new business venture. This idea was rejected by Mr. Soroudi, who declared that he was only interested in modifying the existing Agreement. According to Mr. Soroudi, Mr. Ostroumov never said that the Consultation Agreement had been terminated or that Russo had breached the Agreement.

When heard before the Tribunal, Mr. Ostroumov has not objected to Mr. Soroudi's and Mr. Scott's statements.

When taking into account all the circumstances, the Tribunal concludes that the Consultation Agreement has not been terminated by Aeroflot, nor by Russo.

* * *

15. Russo's Request that the Consultation Agreement be Terminated.

* * *

15.2 The Tribunal's Conclusions.

As stated previously (Section 7), Aeroflot has alleged that, if the term of the Consultation Agreement is not deemed to have run out automatically, it was in any case terminated by a letter, dated February 7, 1997, which was sent to Russo from Mr. A.S. Krasneker, Commercial Director of Aeroflot. However. the Tribunal has found that the Agreement was not terminated by the said letter. Nor has the Agreement, for any other reason, ceased to be valid.

Russo's request that the Consultation Agreement should, by this award, be declared as terminated has been put forward for the first time in a submission from Russo, dated July 31, 2002, that is after the final hearing with the parties. The submission has been sent to Aeroflot, and Aeroflot has not made any objection.

The Tribunal finds that, failing any objection from Aeroflot, Russo's request shall be accepted. The award shall, thus, include a determination formulated in accordance with the said request.

* * *

THE AWARD

1. Aeroflot shall pay the following amounts to Russo:

(a) USD 12,000,000 as damages, based on Aeroflot's failure to pay commissions for the period up to January 2002,

(b) USD 1,000,000 as damages, based on Aeroflot's failure to pay commissions for the period from January 1, 2002 up to the date of this Award,

(c) USD 155,000 as damages, based on Aeroflot's failure to compensate Russo for travel and accommodation expenses,

(d) USD 3,726,937 as interest on the amounts under a-c.

2. The Tribunal declares that, as of the date of this Award, the Consultation Agreement is terminated, along with all continuing rights and obligations of the parties thereunder, except as necessary to produce enforcement of this Award in any appropriate jurisdiction(s). The parties are, without limitation, relieved from the exclusivity clause (Article 13) of the Consultation Agreement and are free to compete without restriction with each other for procurement of airline leases and related transactions as described in the Consultation Agreement within the territory of Iran.

3. The following claims are rejected:

(a) Russo's claim for punitive damages,

(b) Russo's claim for a determination that the guarantee under the Consultation Agreement is enforceable.

4. Aeroflot shall compensate Russo for arbitration costs in an amount of USD 154,799.89.

5. Aeroflot's claim for compensation for arbitration costs is rejected.

6. The compensations to the arbitrators, the secretary and the Arbitration Institute of the Stockholm Chamber of Commerce are determined as follows:

(a) for Justice Magnusson a fee of SEK 600,000,

(b) for Mr. Aksen a fee of SEK 400,000 and compensation for costs amounting to SEK 119,795,

(c) for Professor Kostin a fee of SEK 400,000 and compensation for costs amounting to SEK 43,044,

(d) for Mr. Sandesjö a fee of SEK 125,000 and compensation for costs amounting to SEK 35,064 and

(e) for the Arbitration Institute a fee of SEK 108,000.

7. The parties are jointly and severally liable for the payment of the compensations under 6. As between the parties, Aeroflot shall be obliged to pay SEK 873,177 to Russo.

8. Such part of the security for arbitration costs which remains when the compensations under 6 have been deducted shall be repaid by the Arbitration Institute to Russo.

* * *

s/ Staffan Magnusson
Staffan Magnusson

s/ Gerald Aksen
Gerald Aksen

s/ [illegible]
Alexei A. Kostin
dissenting opinion, attachment

* * *

(2)

Supreme Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

No. 04-146

IN THE

Supreme Court of the United States

AEROFLOT RUSSIAN AIRLINES,

Petitioner,

v.

MGM PRODUCTIONS GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958 in New York, 21 U.S.T. 2517, 330 U.N.T.S. 38 (effective in United States Dec. 29, 1970 and implemented at 9 U.S.C. §§ 201-208) (the "New York Convention" or "Convention"), a United States court may properly confirm the award of a foreign arbitration panel, compensating one party for another's breach of contract, when the contract does not violate United States or international law.

2. Whether this Court should grant certiorari when the decisions below are based on well-settled law, without any conflict with precedents of other Circuits or this Court.

STATEMENT PURSUANT TO RULE 29.6

Respondent, MGM Productions Group, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondent MGM Productions Group, Inc., respectfully prays that the Petition for Writ of Certiorari sought in this matter be denied.

OPINIONS BELOW

Petitioner Aeroflot-Russian Airlines seeks review of the unpublished summary order of the United States Court of Appeals for the Second Circuit, *MGM Productions Group, Inc. v. Aeroflot Russian Airlines*, 91 Fed. Appx. 716 (2d Cir. Feb. 9, 2004), reprinted at Appendix 1a-3a to the Petition for the Writ of Certiorari (the "Petition"). The Second Circuit denied Petitioner's petition for rehearing on April 28, 2004; the unpublished order is reprinted at Appendix 17a to the Petition. The Second Circuit's February 9, 2004 summary order affirmed the unreported May 14, 2003 decision of the United States District Court for the Southern District of New York, available at 2003 U.S. Dist. LEXIS 8174 and 2003 WL 21108367 and reprinted at Appendix 4a-16a to the Petition. The District Court confirmed the November 29, 2002 award of a panel of arbitrators of the Arbitration Institute of the Stockholm [Sweden] Chamber of Commerce, certain excerpts of which appear at Appendix 20a-38a to the Petition.

STATEMENT OF THE CASE

A. *The Consultation Agreement*

In June 1992, Aeroflot-Soviet Airlines, the predecessor-in-interest to Petitioner Aeroflot-Russian Airlines ("Petitioner" or "Aeroflot"), and Russo International Management, Inc. ("Russo"), the predecessor-in-interest to Respondent MGM Productions Group, Inc. ("Respondent" or "MGM"), entered into an exclusive Consultation Agreement ("Agreement"), under

which Russo was to provide consultation services to Aeroflot in connection with Aeroflot's leasing of commercial aircraft and other equipment to Iran Air. The Agreement provided that all disputes should be settled by binding arbitration in Stockholm, Sweden pursuant to the laws of New York State and Russia.

Until August 1996, Russo performed consulting services under the Agreement, and Aeroflot paid some, but not all, of the fees due thereunder. Aeroflot never contended that Russo had breached the Agreement, and never terminated it. Nonetheless, in August 1996, Aeroflot stopped paying fees to Russo altogether, despite repeated representations that payments would resume. After informal attempts to obtain payment failed, Russo submitted a Request for Arbitration to the Arbitration Institute of the Stockholm Chamber of Commerce (the "Institute") on October 27, 1998.

During the period up through and including at least July 2002, Aeroflot continued to sell and lease commercial aircraft, spare parts, and support services to various Iranian airlines, reaping hundreds of millions of dollars in payments. Russo did not receive a payment of consulting fees from Aeroflot after August 1996.

B. ***The Arbitration in Sweden***

The Institute seated an arbitration panel consisting of Justice Staffan Magnusson of the Supreme Court of Sweden (appointed by the Institute), Professor Alexei A. Kostin of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (selected by Aeroflot), and Gerald Aksen, a partner in the New York law firm Thelen, Reid & Priest (selected by

Russo) (collectively, the "Tribunal"). The Tribunal appointed Hakan Sandesjo, Deputy Director General of Sweden's Aliens Appeals Board, as its Secretary.

After years of discovery and other proceedings, the parties appeared before the Tribunal for a four-day hearing in June 2002. For its defense, in addition to asserting substantive contractual grounds under Russian and New York law, Aeroflot asserted that the Agreement was void under New York law and U.S. public policy because it violated Executive Orders by Presidents Reagan and Clinton, as well as the 1995 versions of three provisions of the Iranian Transactions Regulations ("ITRs") promulgated by the Office of Foreign Assets Control ("OFAC") of the U.S. Department of the Treasury, 31 C.F.R. §§ 560.206, 560.410, and 560.515.

On November 29, 2002, the Tribunal issued a thorough and detailed 81-page arbitral award ("Award"), finding that Aeroflot had breached the Agreement and directing Aeroflot to pay Russo more than $13 million in damages, plus interest and costs, totaling more than $17 million. Pet. App. 36a-37a. In the Award, the Tribunal analyzed and rejected each of Aeroflot's arguments, including its arguments that the Agreement violated the ITRs. On January 21, 2003, Russo assigned all of its rights and interest in the Award to MGM.

C. *The District Court Confirmation Proceedings*

In accordance with the New York Convention, on January 23, 2003, MGM filed a Verified Petition to Confirm the Arbitral Award and for Entry of Judgment in the United States District Court for the Southern District of New York. Aeroflot opposed MGM's Petition exclusively on the ground that confirmation of the Award fell under the "public policy"

exception in Article V(2)(b) of the Convention because the Agreement allegedly violated the ITRs. For the first time, Aeroflot argued that confirmation of the Award would violate the 1997 versions of the ITRs it had cited to the Tribunal; Aeroflot also alleged violations of 1995 and 1997 provisions of the ITRs, 31 C.F.R. §§ 560.204 and 560.208, that it had never previously cited.

After extensive briefing and oral argument, on May 14, 2003, the District Court issued a carefully reasoned twelve-page Decision and Order confirming the Award. After considering all of Aeroflot's evidentiary submissions, the District Court, like the Tribunal, found that the Agreement did not violate the ITRs, and therefore rejected Aeroflot's public policy defense to confirmation of the Award. Pet. App. 11a. The District Court held in the alternative that even if the Agreement violated the ITRs, this "violation of United States foreign policy" would not contravene the United States' "most basic notions of morality and justice" and thus would not fall within the public policy exception to the Convention. Pet. App. 11a-13a.

Aeroflot appealed. The Second Circuit affirmed the judgment of the District Court in a February 9, 2004 unpublished Summary Order ("Summary Order"). In its Summary Order, the Second Circuit agreed with the District Court that the Agreement did not violate the ITRs, and therefore confirmation of the Award would not fall within the Convention's public policy exception. Pet. App. 2a-3a. After its petition for rehearing was denied, Pet. App. 17a, Aeroflot unsuccessfully moved to stay issuance of the Second Circuit's mandate. This Petition followed.

REASONS FOR DENYING THE PETITION

Because the Second Circuit itself found that the Agreement did not violate the ITRs, the "public policy" questions set forth in the Petition are not fairly presented for review by this Court. Moreover, the decisions below, which were based on well-settled case law interpreting the New York Convention, do not conflict with any decision of this Court or any Court of Appeals. Also, because the decisions below, neither of which was published, apply with specificity to these litigants under the unique facts presented by this case, the Petition does not present issues worthy of review by this Court. Finally, the decisions below, which reflect thirty years of virtually unanimous precedent in the United States and worldwide, are supported by the policy considerations underlying the New York Convention itself, which do not recognize trade sanctions as national "public policy" sufficient to permit a court to disregard a foreign arbitral award.

I. Neither of Aeroflot's "Questions Presented" Were Raised Or Decided by the Second Circuit's Summary Order.

The first "Question Presented" posed by Aeroflot — "[w]hether a U.S. court should defer to a foreign arbitral panel in determining whether the panel's award is contrary to U.S. public policy. . . ." (Pet. i) — is not raised by the Second Circuit's unpublished summary order. The Second Circuit panel cited specifically to the arbitrators' finding that "the Agreement provided only for transactions between Russo and Aeroflot," and noted that the Court should "accord great deference to the arbitrator's factual findings and contractual construction," *i.e.*, the uncontroversial proposition that an

arbitration award should not be avoided based on an arbitrator's alleged error of law or fact. Pet. App. 2a (citing *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316 (2d Cir. 1998)). The Tribunal did not (and could not) opine as to what U.S. public policy is, under the Convention's procedures for confirmation of arbitral awards, and the Second Circuit panel certainly did not (and could not) "defer" to the Tribunal's non-existent determination of U.S. law. In other words, the Second Circuit properly made its own determination about the legal consequences, under the Convention, of the facts already found and contractual interpretation applied by the Tribunal. Aeroflot's reliance on *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987), is thus misplaced. The *Misco* Court specifically held that "[a] court's refusal to enforce an arbitrator's interpretation of a[n] . . . agreement is limited to situations where the contract *as interpreted* would violate 'some explicit public policy. . . .'" *Id.* at 43 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)) (emphasis added). Here, the contract as interpreted by the Tribunal did not violate public policy, so the Second Circuit's enforcement of the resulting arbitral award did not raise the "deference" issue contained in Aeroflot's first "Question Presented."

In any event, the Summary Order states that even if no deference were given to the Tribunal's findings, the result would be the same, because the Court of Appeals determined in the alternative that "it would be, at most, doubtful that the Agreement violated the 1995 ITRs." Pet. App. 3a. Having reached its own independent conclusion that the Agreement likely did not violate the ITRs, the Second Circuit went on to conclude that enforcement of the Agreement would not violate U.S. "public policy." *See Misco*, 484 U.S. at 44

(holding that "speculation or assumption" that was "tenuous at best" provided "insufficient basis" for public policy challenge to arbitral award). Thus, because the Court of Appeals did not "defer" to the foreign arbitral panel "in determining whether the panel's award is contrary to U.S. public policy," the first alleged Question Presented is simply not presented for review.

The second "Question Presented" posed by Aeroflot, which asks "whether an arbitral award ordering payment under a contract that violates U.S. sanctions laws . . . is contrary to U.S. public policy within the meaning of the New York Convention" (Pet. i), also was not raised by the Second Circuit's unpublished summary order. The Second Circuit panel did not purport to uphold an award of payment despite a violation of "sanctions laws." Rather, it specifically held that it was "at most, doubtful" that the Agreement violated the 1995 version of the ITRs and that the Award was not governed by the 1997 ITRs because Aeroflot's breach of the Agreement occurred prior to the effective date of the 1997 ITRs.[1] Thus, because the Second Circuit, the District Court, and the Tribunal have all found that the Agreement *did not violate* U.S. "sanctions laws," the second alleged "Question Presented" is not properly presented for decision by this Court.

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1. In any event, at the arbitration Aeroflot failed to argue the applicability of the 1997 version of the ITRs and failed to adduce any evidence of any alleged violation of those regulations. Accordingly, although the Second Circuit elected to consider the applicability of the 1997 ITRs, this argument was waived, *see, e.g.*, *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998), and does not provide a basis for a grant of certiorari.

II. The Second Circuit's Decision Raises No Conflicts with Decisions of Other Circuits Or This Court

Aeroflot does not claim that there is any conflict in the circuits, or any similar issues pending in other circuits that would warrant review by this Court. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974), which established that an arbitral award is enforceable in the U.S. unless enforcement would "violate the forum state's most basic notions of morality and justice" was decided thirty years ago and is still controlling authority. *See, e.g., Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315-16 (2d Cir. 1998); *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 152-53 (2d Cir. 1984).

Aeroflot misleadingly suggests that only "the Second Circuit and state and district courts following Second Circuit precedent" apply an anomalously narrow interpretation to the "public policy exception" to the New York Convention. Pet. 6. Tellingly, Aeroflot fails to cite *a single* decision of any United States Court of Appeals that conflicts with the Second Circuit's holdings. In fact, the Second Circuit's analysis of Article V(2)(b) of the Convention has been expressly endorsed by the Fifth, Sixth, Seventh, and Eleventh Circuits, as well as numerous other federal courts. *See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 305-06 (5th Cir. 2004); *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001); *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998); *M&C Corp. v. Erwin Behr GmbH*, 87 F.3d 844, 851 n.2 (6th Cir. 1996); *CBS Corp. v. WAK Orient Power & Light Ltd.*, 168 F. Supp. 2d 403, 415 (E.D. Pa. 2001); *see also*

Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 & n.3 (1st Cir. 1982) (enforcing foreign arbitration provision under Article II of Convention despite contrary Puerto Rico statute) (citing *Parsons*).[2] Thus, far from being an outlier, the Summary Order is in accord with *unanimous* federal case law on this issue.

Contrary to Aeroflot's suggestions, the Summary Order and the *Parsons* decision are also in perfect harmony with the Supreme Court's many decisions holding that both the Convention and the broader public policy of this nation favor resolution of international commercial disputes in foreign arbitral forums in accordance with parties' arbitration agreements. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) ("The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (noting with approval that Congress' purpose in entering the Convention was "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries"); *cf. M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (rejecting "public

2. In *Ministry of Defense of Islamic Rep. of Iran v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992), the Ninth Circuit expressly declined to rule on public policy arguments under the Convention that were based on the ITRs. *See id.* at 773-74. Accordingly, the Ninth Circuit's opinion sheds no light at all on the public policy exception under the Convention, and certainly does not suggest any "split" in interpretation from the other Courts of Appeals.

policy" challenge to contractual choice of foreign forum and stating, "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."). Thus, the Summary Order is consistent with all available authority, leaving no basis for certiorari.

III. The Second Circuit's Decision Applies Properly Stated Rules of Law, And Does Not Raise Issues Worthy of Certiorari

As this Court's Rules make clear, "[a] petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Aeroflot's feeble attempts to attack the Summary Order – and, for the first time in this Petition, the Second Circuit's landmark *Parsons* decision – are without merit and thus do not raise any issues worthy of certiorari.

First, Aeroflot incorrectly states that the Petition "relates to a pure issue of law, not the facts of the transaction or the interpretation of the contract." Pet. 8 n.4. This is simply untrue, as the Summary Order recognized when it noted the deference due to the Tribunal's "factual findings and contractual construction" and recounted the Tribunal's factual finding that "the Agreement provided only for transactions between Russo and Aeroflot." Pet. App. 2a. This factual finding, which provided an independent basis for the Tribunal's determination that the transactions at issue did

not violate the ITRs, was reflected in the Tribunal's finding that "Russo's consulting responsibilities ran only to Aeroflot and not to any entity in Iran." Pet. App. 31a. Thus, because the decision below turns upon its own unique facts, and it will affect no one other than the litigants in this case,[3] it is an improper vehicle to address the broad questions Aeroflot wishes this Court to answer.

Second, Aeroflot's argument that the Second Circuit abdicated its duty to review public policy challenges to arbitral awards is simply wrong. As set forth in Part I, *supra*, both the District Court and the Second Circuit specifically addressed Aeroflot's public policy arguments and held that they had no merit. The Tribunal merely made factual findings and interpreted the Agreement between the parties. Thus, even if Aeroflot were correct that "private arbitrators owe no duty to safeguard the public interest" and therefore that public policy challenges are within the unique province of the federal judiciary (a proposition not supported by this Court's prior decisions), this argument would be beside the point, because the Tribunal did not, and could not, rule as to the effect of U.S. public policy on the petition to confirm the arbitration award. In other words, the judicial review prompted by MGM's petition to confirm the award has satisfied the requirement of judicial review of public policy challenges to arbitral awards that Aeroflot claims to find in this Court's precedents, such as *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (U.S. courts'

3. The unpublished Summary Order may not be cited in unrelated cases and thus has no precedential value. *See* Second Circuit Local Rule 0.23. As Aeroflot concedes, "where the only interests at stake are those of the parties to the arbitration, courts are rightly hesitant in entertaining a party's complaints about the unfairness of the forum it chose by contract." Pet. 15.

review "at the award enforcement stage" is sufficient to "ensure that the legitimate interest in the enforcement of the . . . laws has been addressed"), and *Misco*, 484 U.S. at 44-45 ("Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task").

Third, although Aeroflot argues that international arbitrations should be accorded no more deference than any other arbitral proceeding, this Court's teachings about the broad pro-enforcement bias underlying the New York Convention fully support the Second Circuit's view, reflected in the *Parsons* decision and its progeny, that international arbitral awards under the Convention are entitled to significant deference. *See, e.g.*, *Mitsubishi*, 473 U.S. at 638 ("the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal"); *Scherk*, 417 U.S. at 520 n.15; *see also M&C Corp.*, 87 F.3d at 851 n.2 ("Whatever may be meant by the manifest disregard doctrine in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral ~~award~~."). In addition, the Convention's supranational emphasis renders irrelevant the case law on labor-management arbitrations pursuant to collective-bargaining agreements under United States law, on which Aeroflot relies. *See Eastern Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 60 (2000); *Misco*, 484 U.S. at 31-32; *Grace*, 461 U.S. at 762-63. Moreover, even in these domestic labor arbitration cases, this Court ruled that the issues alleged to constitute violations of public policy did not rise to the level necessary to set aside an arbitral award. *See id.*

IV. Aeroflot's Theory That Any Violation of Trade Sanctions Constitutes a "Public Policy" Violation Under the Convention Is Without Merit

Aeroflot's insistence that an alleged violation of "positive" or "mandatory" laws "designed to protect the interests of the State" inevitably translates into a "public policy" under the Convention, Pet. 13-16, directly conflicts with well-settled authority. *See, e.g., A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd.*, No. 88 Civ. 4500, 1989 WL 115941, at *2 (S.D.N.Y. Sept. 27, 1989):

> All laws, be they procedural or substantive, are founded on strong policy considerations. Yet not all laws represent this country's 'most basic notions of morality and justice.' Were it otherwise, the Convention's public policy exception would eviscerate the very goal of the Convention as a whole – to encourage the recognition and enforcement of commercial arbitration agreements.

Aeroflot has not cited *any* authority for the proposition that trade sanctions, generally, or the ITRs, specifically, constitute the "public policy" of the United States *for purposes of the Convention*. The only cases cited by Aeroflot deal with the domestic enforcement of contracts – not the confirmation of international arbitration awards – and are thus irrelevant to the issues before this Court. *See Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240 (2d Cir. 1991) (refusing to allow the Iranian government to enforce a contract for the exportation of prohibited goods from the U.S. to Iran); *Hurd v. Hodge*, 334 U.S. 24, 35-36 (1948) (prohibiting District of Columbia courts' enforcement of racially restrictive

covenants pursuant to inherent supervisory powers, Civil Rights Act, Fourteenth Amendment, and "public policy"); *McMullen v. Hoffman*, 174 U.S. 639, 654-55 (1899) (refusing to enforce agreement to make illegally rigged bids on public works projects).[4]

Well-settled federal law demonstrates that, under the Convention, an arbitration award alleged to violate U.S. trade sanctions does not violate U.S. "public policy." In *Parsons*, the U.S. had enacted trade sanctions cutting off aid to Egypt well before the arbitrators issued their final award. *See Antco Shipping Co. v. Sidermar, S. p. A.*, 417 F. Supp. 207, 216 (S.D.N.Y. 1976) (describing underlying facts of *Parsons* and citing trade sanctions enacted under 22 U.S.C. § 2370(p), (t) (1971)). In addition, the State Department had expressly instructed Parsons' personnel to leave the country. *See id.* at 216. Nevertheless, after reviewing the drafting of the Convention and the congressional purpose in ratifying it, the Second Circuit properly recognized that despite the importance of these rules on the national level, the "supranational emphasis" of the public policy exception required something more. *See* 508 F.2d at 972-73. The public policy exception was meant to apply to fundamental notions of "morality and justice" — not parochial, albeit important,

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4. Significantly, Aeroflot's entire "public policy" argument rests on the assumption that a violation of the ITRs necessarily renders the Agreement unenforceable, because "a contract that violates a mandatory rule of law is unenforceable." Pet. 7. This assumption is unfounded. In fact, New York courts – the Agreement provides for application of New York or Russian law – are generally reluctant to find contracts unenforceable, even if held to be illegal, where a failure to enforce the contract would result in an unfair windfall. *See, e.g., Lloyd Capital Corp. v. Pat Henchar Inc.*, 603 N.E.2d 246, 247-48, 80 N.Y.2d 124, 127-28 (1992).

foreign policy objectives. The panel summarized its conclusion by holding that "[t]o deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement." 508 F.2d at 974. Contrary to Aeroflot's suggestion, Pet. 14, nothing in *Parsons* suggests that the decision hinged on the existence or non-existence of a specific statute or "positive law." The issue in *Parsons* was over the nature of the public policy exception itself — whether it was to be defined by reference to the happenstance of national law or by more fundamental principles of "morality and justice." The Second Circuit clearly held that foreign policy — however expressed — did not rise to the level of "public policy" as that term is used in the Convention. *Id.* at 974.

More recently, in *Nat'l Oil Corporation v. Libyan Sun Oil*, 733 F. Supp. 800 (D. Del. 1990), the U.S. District Court for the District of Delaware also addressed whether U.S. trade sanctions constituted public policy for purposes of the Convention. In *Nat'l Oil*, the U.S. Government had enacted a series of trade sanctions against Libya. As a result of these trade sanctions, Sun Oil, an American corporation, failed to perform its contract with a Libyan government entity, which then won an arbitral award against Sun Oil for breach of contract. *See id.* at 805. Sun Oil argued that enforcement of the award was barred under the public policy of the United States, because the United States had directly prevented completion of the contractual project. Sun Oil also argued that enforcing the award would benefit the Qadhafi Government, whose "terrorist activities, which have been condemned internationally, are hardly just a parochial interest of the U.S." *Id.* at 819-20.

The Delaware district court ruled that the foreign policy of the United States — even though clearly and unequivocally expressed in regulations and executive orders — was not synonymous with "public policy" as used in the Convention. *See id.* at 819-20. The court also dismissed Sun Oil's arguments that confirmation of the award "would mean that U.S. dollars would end up financing Qadhafi's terrorist exploits," concluding that "Libya's terrorist tactics and opportunistic attitude toward international commercial arbitration are simply *beside the point.*" *Id.* (emphasis in original); *see also Belship Navigation, Inc. v. Sealift, Inc.*, No. 95 Civ. 2748, 1995 WL 447656, at *6 (S.D.N.Y. July 28, 1995) (compelling arbitration under Convention, despite allegations that underlying agreement violated U.S. trade sanctions, and holding that "[a]lthough 'national policy' prohibits dealing with Cuba, the 'public policy' exception in the Convention 'was not meant to enshrine the vagaries of international politics under the rubric of public policy'") (quoting *Parsons*, 508 F.2d at 974); *Antco Shipping Co. v. Sidermar, S.p.A.*, 417 F. Supp. 207, 217 (S.D.N.Y. 1976) (enforcing arbitration provision because, even if contract violated "national policy," as expressed in the Export Regulations Act and anti-boycott regulations, it did not "contravene the public policy of the United States" for purposes of the Convention).

Faced with the uniformity of U.S. case law on this issue, Aeroflot attempts to rely on foreign cases to justify its position, to little effect. *See* Pet. 13 n.7. Foreign case law obviously does not set precedent for this Court. Moreover, even in the international arena, the widespread acceptance of the *Parsons* analysis has resulted in virtually no refusals to enforce awards due to the public policy exception.

One study demonstrated that, in the first 20 years following the introduction of the Convention,

> of the one hundred and twelve decisions recorded as having applied the New York Convention, only three refused enforcement of an award on the grounds of a breach of public policy. Of those three decisions, two are in fact based on the non-arbitrability of the subject-matter, [and the third could] equally have been based on . . . a violation of the principles of due process.

See FOUCHARD, GAILLARD, & GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION 996-98 (Emmanuel Gaillard, *et al.*, eds., Kluwer Law International 1999).[5]

Rather than helping Aeroflot, the few outlying international decisions it cites demonstrate the wisdom of United States courts' interpretation of the Convention and

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5. The extraordinary reluctance of foreign courts to set aside foreign arbitral awards based on the "public policy exception" is inextricably linked to U.S. courts' narrow interpretation of the exception. Courts and commentators worldwide have adopted the *Parsons* interpretation of its meaning. *See, e.g.*, International Law Association Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, at 4, *in* International Law Association, *Report of the New Delhi Conference* (2002) ("The most oft-quoted comment, in arbitration case law, is that of Judge Joseph Smith in *Parsons* . . . in which he stated that enforcement of a foreign award should be denied 'only where enforcement would violate the forum state's most basic notions of morality and justice.'"); Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol. 175, 197 (1997) (describing *Parsons* as "the case setting out the U.S. standard for a public policy violation").

the folly that ensues when national policies are elevated to supranational status. For example, the Malaysian decision cited by Aeroflot actually demonstrates the worst face of national parochialism. While declining, on factual grounds, to vacate an arbitral award, the Malaysian High Court suggested in *dicta* that, in light of Malaysia's long-standing enmity toward and boycott of Israel, it would vacate an award if it were convinced the transaction involved an Israeli party or destination. *See Harris Adacom Corp. v. Perkom Sdn Bhd*, [1994] 3 Malayan L.J. 506 (Kuala Lumpur High Court Dec. 10, 1993), *excerpted in* 22 Y.B. Comm'l Arb. 753. It is hard to imagine a more pernicious precedent for the freedom of international trade, or one less in keeping with the purposes of the Convention.[6]

Aeroflot also cites a case from the United Kingdom, *Soleimany v. Soleimany*, 1998 WL 1043634, [1999] Q.B. 785 (C.A. 1998) (Eng.)), apparently unaware that the *Soleimany* decision has been strictly limited to its facts by a subsequent English Court of Appeal decision that is entirely in accord with *Parsons*. *See Westacre Investments Inc. v. Jugoimport-SPDR Holding Co.*, 1999 WL 477322, [2000] Q.B. 288, [1999] 2 Lloyd's Rep. 65 (C.A. 1999) (Eng.) (enforcing Swiss arbitral award under Convention based on agreement alleged by defendants to violate U.K. and other countries' foreign corrupt practices law); *see also Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 Lloyd's Rep. 222 (Q.B. Comm. Ct. 1999) (Eng.) (upholding Swiss arbitral

6. Aeroflot also cites an Austrian case that is completely unrelated to trade sanctions, but nevertheless reaches the absurd conclusion that Austrian public policies disfavoring gambling justified a refusal to confirm an arbitral award involving a margin sale. *See Judgment of May 11, 1983*, 1983 Osterreichische Juristenzeitung 519 (Oberster Gerichtshof) (Austria), *excerpted in* 10 Y.B. Comm'l Arb. 421.

award against public policy challenge on foreign corrupt practices grounds, and noting that defendant's reliance on *Soleimany* was "misplaced" in the wake of *Westacre*); Shai Wade, *Westacre v. Soleimany: What Policy? Which Public?*, 2(3) Int'l Arb. L. Rev. 97, 100 (1999) (available on Westlaw) ("The Court of Appeal's decision in *Westacre* . . . signifies a return to the emphasis normally placed on the continued unhindered operation of the New York Convention as an overriding policy in matters concerning international arbitration.").

Aeroflot's contention that "the practice of this country's treaty partners" supports its position, Pet. 16, is therefore without merit. Indeed, considerations of reciprocity with other nations, a fundamental consideration underlying Congress' ratification of the Convention, suggest that U.S. courts' continued narrow interpretation of the "public policy exception" should continue, in accord with the vast majority of courts in other nations. The continued narrow interpretation by U.S. courts of the Convention's public policy exception is a crucial underpinning of international commerce and trade, and the willingness and ability of companies to enter into international commercial agreements.

Finally, Aeroflot's position directly contradicts the pro-enforcement bias of the Convention and of the congressional policy underlying its ratification. Because trade sanctions do not rise to the level of basic notions of morality and justice, they do not provide a "loophole" to enforcement of arbitral awards under the Convention. There is nothing *inherently* wrong with the act of trading with Iran, just as today, there is nothing inherently wrong with trading with Egypt, though when *Parsons* upheld its arbitral award, it was illegal to do

so.[7] The ITRs themselves permit trade with Iran where a license is obtained or when one of many exclusions applies, *see* 31 C.F.R. § 560.501 to .537, demonstrating that the conduct at issue is *malum prohibitum*, not *malum in se*. Thus, the ITRs do not proscribe conduct that is, in and of itself, offensive to basic notions of morality and justice, and therefore could not provide grounds for setting aside an foreign arbitral award under the Convention.

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7. As another example of what the *Parsons* decision referred to as the "vagaries of international politics," 508 F.2d at 974, the public policy challenge in the 1976 *Antco* case relied on a shipping contract's alleged violation of U.S. regulations forbidding boycotts of Israel – but the unchallenged purpose of the contract, which involved exportation of oil from Libya, would itself be prohibited by U.S. trade regulations only a few years later. *Compare Antco*, 417 F. Supp. at 210, *with Sun Oil*, 733 F. Supp. at 804.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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IN THE

Supreme Court of the United States

AEROFLOT-RUSSIAN AIRLINES,

Petitioner,

—v.—

MGM PRODUCTIONS GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

I.

THE COURT BELOW DECIDED THE QUESTIONS PRESENTED IN THE PETITION.

Respondent's assertion that the questions presented were not decided below, *see* Brief in Opposition ("Opp.") 5-7, is incorrect. The Court of Appeals held as follows:

> [1] the arbitrators found that since the Agreement provided only for transactions between Russo and Aeroflot, it did not contravene the regulations. We accord great deference to the arbitrator's factual findings and contractual construction. ... [2] Even if ... we did not, it would be, at most, doubtful that the Agreement violated the 1995 ITRs. And, as such, the Agreement cannot be said to violate fundamental public policy. *See Parsons & Whittemore Overseas Co. v. Societé Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 973-74 (2d Cir. 1974).

Appendix to Petition ("App.") 2a-3a. Thus, there are two alternative bases for the Court of Appeals' holding: (*i*) the court deferred to the arbitrators' conclusion that the Iranian Transactions Regulations ("ITRs"), 31 C.F.R. §§ 560.101-560.901, are not violated as long as a U.S. company does not engage in a transaction directly with an Iranian entity, and (*ii*) the court held that a violation of the Iranian Transactions Regulations, unless clear beyond doubt, does not rise to the level of "fundamental public policy" as articulated in the

Parsons case.[1] These two issues are the questions that the Petition presents. *See* Petition ("Pet."), at i.

II.

THE LEGAL ISSUES PRESENTED IN THE PETITION ARE NOT SPECIFIC TO THE FACTS OF THIS CASE.

For the reasons set forth in the Petition, this case presents important issues that have not been, but should be, resolved by this Court. Contrary to what respondent appears to suggest, *see* Opp. 11, this Court has frequently granted certiorari to review summary orders not designated for publication, particularly where, as here, the decision rests on earlier circuit precedent that has not been reviewed by this Court. *See, e.g., Massaro v. United States*, 538 U.S. 500, 503 (2003). The

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[1] Respondent erroneously states that the Court of Appeals "found that the Agreement *did not violate* U.S. 'sanctions laws,'" Opp. 7 (original emphasis), but elsewhere respondent concedes that that court only implied "that the agreement *likely* did not violate the ITRs," Opp. 6 (emphasis added). The court expressed no definite conclusion on whether the agreement actually violated the 1995 ITRs; however, it did not question that the agreement violated the 1997 ITRs, which make explicit that "facilitating" a foreign national's trade with Iran falls within the scope of the prohibition. *See* 31 C.F.R. §§ 560.206(b), 560.208. Had the court actually made an independent effort to parse through the definitions in the 1995 ITRs, it would have seen that the agreement violated those regulations as well. *See* 31 C.F.R. §§ 560.206, 560.304(b), 560.306(a)(2), (e) (1996 ed.) (barring transactions "relating to" "[g]oods which have entered into Iranian commerce," such as the aircraft leased to Iran, or "relating to" "[s]ervices performed" "in Iran," such as the commercial airline service provided by Iran Air, or "relating to" "services performed" by an "entity owned or controlled" by the Government of Iran, such as Iran Air); *see also Comet Enters. Ltd. v. Air-A-Plane Corp.*, No. 2:95CV926, 1996 U.S. Dist. LEXIS 4393, at *16 (E.D. Va. Feb. 27, 1996) ("obtaining orders from Iran Air" violated 1995 ITRs), *rev'd on other grounds*, 128 F.3d 855 (4th Cir. 1997).

courts below saw the case as controlled by the Second Circuit's prior decision in *Parsons* (*see* App. 3a, 9a-10a, 12a), but *Parsons* is not binding on this Court.

Respondent seizes on the phrase "factual findings and contractual construction" in the Second Circuit's order, App. 2a, Opp. 10-11, to argue that this case turns on a question of fact peculiar to this case. But the questions raised by the Second Circuit's decision and presented by the Petition are not fact-specific in the least: first, whether judges should defer to arbitrators as to questions of law concerning the enforceability of their own award in the U.S. under the public-policy exception and, second, whether enforcement of an award directing payment for services in violation of U.S. trade sanctions laws is "contrary to public policy of [the U.S.]" within the meaning of Article V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (the "New York Convention").

Respondent also argues that erroneous arbitral factfinding does not give rise to a public policy defense, Opp. 6-7, but Aeroflot has not contested the arbitrators' findings of fact here or in the courts below. Despite the imprecisely drafted language in the Court of Appeals' summary order, no factual dispute was at issue. The Consultation Agreement, the arbitrators' award, and both parties' briefs in the Court of Appeals were all in agreement that Russo's contractual duties ran only to Aeroflot and that those duties consisted of providing consulting services to Aeroflot for leasing Russian commercial aircraft to Iran Air and other Iranian airlines operating in Iran. *See* App. 21a, 24a, 29a-31a; Appellee's Brief 12-13; Appellant's Reply Brief 1-2. The issues before the District Court and the Court of Appeals were pure questions of law: (*i*) whether the undisputed facts as found by the arbitrators amounted, as a matter of law, to a violation of the

applicable U.S. trade sanctions laws, and (*ii*) if so, whether enforcement of the award would be a violation of U.S. public policy under the New York Convention. On each of these questions of law, the Court of Appeals deferred to the arbitrators. *See* Pet. 5-6, 10; App. 2a. Labeling these legal issues as questions of fact or contractual interpretation does not make them such.

III.

THE DECISION BELOW HAS NO BASIS IN PRECEDENT.

Respondent's argument and the decision below fail to appreciate the difference between (*i*) an assertion that the arbitrators' decision violates fundamental morality and justice and (*ii*) the well-established defense that national courts cannot enforce an award based on a cause of action that itself is repugnant to U.S. public policy. While the first of these two branches of the public-policy doctrine is raised by litigants more often—and therefore receives more mention in the case law—there is no support for respondent's apparent suggestion that the second branch of the doctrine can simply be ignored. Where, as here, the underlying contract as interpreted by the arbitrators is alleged to violate national law, it is long settled that the court asked to enforce the award has a duty to make its own independent determination as to whether enforcement of the contract violates public policy. *See generally* Pet. 6-11 (citing cases).

Neither respondent nor the courts below have taken issue with the proposition that a *cause of action* on a contract that violates the Iranian Transactions Regulations is contrary to public policy.[2] It is also clear that an *arbitral award* on a

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[2] *See National Petrochemical Co. v. M/T Stolt Sheaf*, 930 F.2d 240, 243 (2d Cir. 1991) (so holding); *Comet*, 1996 U.S. Dist. LEXIS 4393, at

(footnote continued)

contract that violates public policy as interpreted by the arbitrators is itself unenforceable as violating public policy. *See* Pet. 7, 8, 11 (citing cases). But respondent has advocated, and the courts below have adopted, the conclusion that international arbitration awards subject to the New York Convention are a unique exception to this settled rule, despite the Convention's clear language incorporating the enforcing country's public policy. *See* Opp. 12-13; Pet. 9-10.

Contrary to what respondent suggests, this exception has no support in this Court's precedents. Petitioner relies on cases decided at the stage of a motion to compel arbitration, Opp. 9-10, 12, but those very cases make clear that the decision to allow arbitration to proceed does not deprive "the national courts of the United States ... [of] the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the ... laws has been addressed." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974).[3]

Respondent also cannot rely on those cases' general language regarding international comity to support the suggestion that the rules governing the public policy defense in the domestic context somehow fail to apply in the interna-

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(footnote continued)

*16 (same); *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 557, 13 Cal. Rptr. 3d 174, 193 (2004) (same). Respondent alludes to cases that, as an exception to the usual rule, have applied a balancing test when the illegality relates only to a peripheral matter, *see* Opp. 14 n.4; but here, the substance of the parties' contract is illegal in its entirety.

[3] *See also Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982) (cited by respondent; arising at pre-arbitration stage); *Belship Nav., Inc. v. Sealift, Inc.*, 1996 A.M.C. 209 (S.D.N.Y. 1995) (same).

tional context. This Court's subsequent cases have made clear that the policy favoring arbitration articulated in *Mitsubishi* and *Scherk* extends with equal vigor to the domestic arbitration context.[4] Respondent effectively concedes that a domestic arbitral award on a contract that violates the ITRs would be unenforceable.

Respondent also asserts that the decision below was based on "well-settled" U.S. law, Opp. 14; but as authority for this proposition, it cites only the Second Circuit Court of Appeals' own prior decision in *Parsons* and two district court cases (including one from that circuit) following *Parsons*. *See* Opp. 14-15. Moreover, contrary to what respondent alleges, Opp. 8, case law from other circuits supports Aeroflot's position that an arbitral award on a contract that violates the ITRs is unenforceable under the public policy defense of the New York Convention. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998) (public-policy standard articulated by this Court in *domestic* arbitration context "applies with equal

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[4] *Mitsubishi and Scherk* distinguished, in the international context, the now-discredited case of *Wilko v. Swan*, 346 U.S. 427 (1953), which had artificially restricted arbitrability of securities claims. But after this Court limited and then overruled *Wilko* in the domestic context, the distinction that *Mitsubishi* and *Scherk* had drawn between domestic and international arbitration largely vanished. *See Shearson/Am. Express v. McMahon*, 482 U.S. 220, 224, 229-20 (1987) (limiting *Wilko*; applying *Mitsubishi* and *Scherk* in domestic context; rejecting attempt to distinguish *Mitsubishi* as international case); *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477 (1989) (overruling *Wilko*); *see also, e.g., Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (following *Mitsubishi* in domestic context without comment on its origin as international case); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 729 (1996) (same); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28-31 (1991) (same).

force in the context of international arbitral awards"); *Ministry of Defense of Islamic Rep. of Iran v. Gould, Inc.*, 969 F.2d 764, 773-74 (9th Cir. 1992) (remanding for determination of whether enforcement of international arbitral award under Convention would violate Iran sanctions). The cases that respondent cites as "expressly endors[ing]" the Second Circuit's analysis, Opp. 8, do not even address the relevant issue.[5] *None* of those cases considered the enforceability in the U.S. of an award under a contract that violates U.S. law—much less trade sanctions laws or other laws enacted to protect the national interest.

Moreover, as Aeroflot has explained, the precedents of other nations that are parties to the New York Convention squarely establish that an award on a contract that violates trade restrictions is unenforceable under the public-policy defense set forth in the Convention. Pet. 13 & n.7. Unable to distinguish these cases, respondent disparages them as "outlying" decisions, Opp. 17, yet fails to cite *even one case from any jurisdiction*, or even one article or treatise,[6] that has reached the contrary conclusion.

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[5] Each of those cases dealt with an attempted public-policy attack on the quality or admissibility of the evidence presented to the arbitrators, *Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001); *Indus. Risk*, 141 F.3d at 1445; or the substantive correctness of the arbitrators' decision not going to the legality of the underlying transaction, *M&C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 n.2 (6th Cir. 1996); *CBS Corp. v. WAK Orient Power & Light*, 168 F. Supp. 2d 403, 415 (E.D. Pa. 2001); or a party's alleged misconduct in the course of the arbitration, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 305-06 (5th Cir. 2004).

[6] Commentators on the Convention have agreed that the public-policy defense to enforcement applies where the award violates measures of embargo, blockade, or boycott imposed by the enforcing country. *See* Pet.

(footnote continued)

Respondent's assertion that *Soleimany v. Soleimany*, [1999] Q.B. 785 (C.A. 1998) (Eng.), has been "strictly limited to its facts" by later cases, Opp. 18, is simply wrong. The cases cited by respondent reaffirmed *Soleimany*'s relevant holding that an arbitral award on an illegal contract is unenforceable under the New York Convention, and only questioned certain dicta in *Soleimany* relating to proof of facts.[7] *Soleimany* remains good law, and courts in England and elsewhere have continued to cite and follow it.[8]

IV.

COURTS MAY NOT SUBSTITUTE THEIR OWN VIEWS OF "MORALITY AND JUSTICE" FOR THE FOREIGN POLICY JUDGMENTS OF THE PRESIDENT AND CONGRESS.

Respondent also derides the enforcement of trade sanctions as "parochialism," Opp. 18, and even suggests that U.S. trade sanctions against Iran are no better than the Muslim states' boycott of Israel, *id.*, and that "[t]here is nothing *inherently* wrong" about U.S. citizens trading with the Nation's declared enemies, Opp. 19 (original emphasis). But

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(footnote continued)
9, 14-15 (citing authorities); *see also* Serge Lazareff, *Mandatory Extraterritorial Application of National Law*, 11 Arb. Int'l 137, 145-46 (1995).

[7] *See Westacre Investments Inc. v. Jugoimport-SPDR Holding Co.*, [2000] 1 Q.B. 288, 302 (C.A. 1999) (Eng.); *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, [1999] 2 Lloyd's Rep. 222, 225 (Q.B.D. Comm'l Ct. 1999) (Eng.).

[8] *See, e.g., Al-Kishtaini v. Shanshal*, [2001] EWCA Civ. 264, ¶ 38 (C.A. 2001) (Eng.) (following *Soleimany* to hold that contract violating U.K. sanctions against Iraq was unenforceable); *Mond v. Berger*, [2004] VSC 45, ¶¶ 104-115 (Vic. Comm'l & Eq. Div. 2004) (Austl.) (following *Soleimany* to hold that arbitral award that violated state law would not be enforceable).

whatever political arguments respondent might make for these views, the courts may not decide that mandatory, explicitly extraterritorial laws and regulations adopted by Congress and the President do not constitute "public policy" because they are thought by some to be "parochial" or to have little moral weight.

As authorized by statute, *see* 50 U.S.C. § 1702(a)(1), the ITRs by their express terms apply to acts by U.S. citizens and companies anywhere in the world. *See* 31 C.F.R. §§ 560.206, 560.314. While this Court has justifiably been reluctant to extend U.S. laws beyond U.S. boundaries in the face of legislative silence on the subject, *see The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (cited by respondent), such concern to avoid judicial "parochialism" has no basis where, as here, the relevant provision of law has *explicitly* extraterritorial effect, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259 (1991) ("Congress, should it wish to do so," may amend statute to apply outside U.S.). It is not the role of the courts, no matter how good their intentions are, to undercut the Nation's foreign policy in the name of promoting international trade.

There is no room to doubt that the Executive and Legislative branches have treated the ITRs as expressing mandatory public policy of the highest importance. Trade sanctions have been a mainstay of U.S. foreign policy almost since the founding of the Nation. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322-24 & n.2 (1936) (discussing history of U.S. embargo laws from 1794). Violations are punishable by substantial fines and lengthy imprisonment. *See* 50 U.S.C. § 1705; 31 C.F.R. § 560.701. The ban embodied in the ITRs, in particular, "is clothed with the most serious of purposes, and it is couched in the broadest of terms," reflecting "the President's appraisal of the nation's

interest in sanctioning Iran's sponsorship of international terrorism, its frustration of the Middle East peace process, and its pursuit of weapons of mass destruction." *United States v. Ehsan*, 163 F.3d 855, 859 (4th Cir. 1998) (reinstating criminal indictment for violating ITRs). Recently, the President has reaffirmed that "the actions and policies of the Government of Iran continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." Notice, *Continuation of National Emergency with Respect to Iran*, 69 Fed. Reg. 12,051 (The President, Mar. 11, 2004). In view of these clear policy statements from the Executive and Legislative branches, the conclusion of the court below that it could bypass construing the ITRs—either by deferring to a foreign arbitral panel or by insisting that only the most blatant violations meet the *Parsons* "morality and justice" standard—disregards the principle of separation of powers and undermines the rule of law.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the petition should be granted.

Respectfully submitted,

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